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In The

# Supreme Court of the United States

LEONARD M. ROSS,

*Petitioner,*

v.

SANTA BARBARA NEWS PRESS, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The California Court Of Appeal, Second District**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether this Supreme Court should reverse *Gertz v. Robert Welch, Inc.*'s requirement that a private figure plaintiff in a negligence case must prove constitutional malice to recover presumed general compensatory damages for defamatory statements and/or implications involving a public matter.

## PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following parties appeared as defendants below and are respondents here: The New York Times Company, Kathleen Sharp, and David McCumber.

## RULE 29.6 STATEMENT

Respondent Santa Barbara News-Press was a division of The New York Times Company at the time the news articles at issue were published and at the time this lawsuit was filed. Respondent The New York Times Company has no parent corporation, and no publicly held company holds more than 10% of its stock.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully seek a writ of certiorari to the California Court of Appeal, Second Appellate District, in *Ross v. Santa Barbara News Press*, No. B151127.

## OPINIONS BELOW

The opinion of the Court of Appeal at issue here (App. 1a-50a) is not officially published but is reported at 32 Media L. Rep. 1025 and 2003 WL 22220512 (Cal. App. 2003). The order of the California Supreme Court denying discretionary review of that decision (App. 55a) is unpublished. An earlier, relevant decision of the California Court of Appeal (App. 56a-92a) is not officially published but is reported at 25 Media L. Rep. 2089 (Cal. App. 1997). The Superior Court's relevant order (App. 51a-54a) is unpublished.

## STATEMENT OF JURISDICTION

The California Supreme Court issued its order denying Petitioner's petition for review on January 14, 2004. App. 55a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment, which applies to the States through the Fourteenth Amendment, provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." The Ninth Amendment, which provides: "The enumeration . . . of certain rights, shall not be construed to deny or disparage others retained by the people." Finally, the Tenth Amendment, which provides those "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states. . . ."

## STATEMENT OF THE CASE

This defamation case arises from articles Defendants published on November 27, 1988 and February 28, 1989 concerning Plaintiff. Generally, after Plaintiff applied to increase his holdings in Financial Corporation of Santa Barbara ("FCSB"), which owned 100% of Santa Barbara Savings and Loan Association ("SBSLA"), Defendants published the false and defamatory statements and implication that Plaintiff was investigated for several federal felony offenses in connection with one of the most notorious white collar crimes of the 1970's.

On October 4, 1993, the first jury returned a verdict in Plaintiff's favor, in the sum of $5,000,000 for damages to reputation, plus $2.500,000 for emotional harm. On January 14, 1994, the first trial judge granted a motion for a new trial based upon an inconsistency in the verdict. App. 79. The Court of Appeals for the Second District (Division Three), on March 24, 1997, upheld the trial court as to all matters, including the finding that Plaintiff was a private figure and that any concern was created by the newspaper articles, and did not suffice to convert the general subject of the banking industry into a public controversy. App. 92.

The matter was remanded for a new trial. On January 29, 2001, the case proceeded to a second jury trial before Judge Kalin. Defendants, at the end of Plaintiff's case, moved and were granted a directed verdict on the issue of constitutional malice. App. 13. After granting said motion, the court instructed the jury not to award presumed damages based on the absence of malice. The jury returned a verdict of $2,000,000 in general reputation damages and $250,000 in mental distress on March 29, 2001. App. 2.

The parties again appealed. App. 1-3. On September 28, 2003, the Court of Appeal of the State of California, Second Appellate District, Division Three affirmed Judge

Kalin's verdict in all respects, confirming that the article concerned a "public matter" and rejecting Plaintiff's argument that the Court had erred as to the availability of presumed and punitive damages under *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974). App. 38, 41. On January 14, 2004, the California Supreme Court denied discretionary review of this case. App. 113.

## REASONS FOR GRANTING THE WRIT

The Court of Appeal's decisions in this case patently reveal and underscore the inconsistent, and inequitable, results stemming from the application of *Gertz* over the past thirty (30) years. In fact, the Supreme Court has itself been in wide disagreement over the pervasive and troubling manner in which *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) has been broadened so as to undermine the legitimate interest in redressing injury to private figure defamation plaintiffs while seemingly affording greater First Amendment protections to the media's dissemination of false statements of facts and implications.

Specifically, the haphazard extension of *New York Times* has created onerous, uncertain and inconsistent standards and tests based upon the content of statements. Courts have, in applying *Gertz*, experienced great difficulty in applying such concepts with any certainty. Namely, the Supreme Court has roughly dissected the sphere of *Gertz* into "public-private matters," "private-public figures," and "private-public controversies." These categories have adversely impacted various aspects of defamation law, spawning great confusion about, and resulting in the misconstruction and misinterpretation of, *Gertz* standards for the award of actual damages, actual-compensatory presumed damages and inferred-compensatory presumed damages. The extension of the

*New York Times* malice requirement for the award of presumed compensatory damages to private figures diminishes widely held and firmly established common law protections while providing little disincentive for media perpetrators of character assassination.

This case builds a constitutional mountain out of a common law defamation action by a private figure plaintiff regarding a fictitious event reported by reckless journalists. Two trial courts and two appellate opinions determined that the reported events were neither public controversies nor public concerns, and of no public significance whatsoever. In addition, no finding was ever made that such matter was public in nature. Moreover, despite two multi-million dollar jury awards of general reputation damages suffered by plaintiff as a result of the false and defamatory publication, relying on *Gertz*, both the trial court and Court of Appeal denied plaintiff his common law right to seek presumed compensatory damages.

## I. This Court Should Reverse *Gertz* And Return To The States The Jurisdiction, Right And Responsibility To Develop And Apply Common Law Remedies And Restrictions For Private Figure Defamation Plaintiffs.

### A. The Over-Extension And Misapplication Of *New York Times* v. *Sullivan*.

Until *New York Times,* the law of defamation was almost exclusively the business of state courts and legislatures. Under the then prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt, or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common law malice were shown. General

damages for injury to reputation were presumed and awarded because the judgment of history was that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." *Restatement of Torts § 621,* Comment a, p. 314 (1938). This is particularly true due to transformations in the technological and economic structure of the converging media industry. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 783 (1985). The defendant was permitted to show that there was no reputational injury; but at the very least, the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable *per se*. This rule performed "a vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in character since it often permits a defamed person to expose the groundless character of a defamatory rumor before harm to the reputation has resulted therefrom." *Id. § 569*, Comment b, p. 166.

*New York Times* was the first major step in what proved to be a seemingly irreversible and untenable process of constitutionalizing the entire law of libel and slander. Under the rule announced in that case, a *public official* suing for libel could no longer make out his case by proving a false and damaging publication. He could not establish liability and recover any damages, whether presumed or actually proved, unless he proved "malice," which was defined as a knowing falsehood or a reckless disregard for the truth. 376 U.S. at 280. Given that proof, however, the usual damages were available, including presumed and punitive damages. This judgment overturning 200 years of libel law was deemed necessary to implement the First Amendment interest in "uninhibited, robust, and wide-open" *debate on public issues involving public officials. Id.* at 270.

The state libel law at issue in *New York Times* provided that if a publication was "libelous per se," then the defendant had "no defense" as to the stated facts unless he could persuade the jury that "they were true in all their particulars." *Id.* at 267. The Court rejected such a rule as being repugnant to the First and Fourteenth Amendments because "*would-be critics of official conduct may be deterred from voicing their criticism.*" *Id.* at 279. In other words, the availability of the defense of truth, standing alone, was insufficient to negative the self-censorship the Court held would result from the seditious libel aspects of common law of defamation. For these reasons, the Court issued a new constitutional rule prohibiting the states from allowing a *public official* to recover damages for a defamatory falsehood *relating to his official conduct* unless he proves that the statement was made with actual malice. *New York Times* clearly concerned libel litigation initiated by *public officials acting as surrogates for the state* under a state law imposing upon defendant the burden of truth.

Three years later, the same rule was applied to plaintiffs who were not public officials, but who were termed "*public figures.*" *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967). To the extent that dicta in subsequent cases may be read to suggest that the requirement of proving falsity rests upon the plaintiff, these cases also involved either public officials or what were later denominated as public figure libel plaintiffs. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 85 (1964); and *Herbert v. Lando*, 441 U.S. 153, 175-76 (1979). Thus, they have no applicability to the instant case, which involves a private figure plaintiff.

In the years immediately following *New York Times*, this Court struggled between maintaining *New York Times*' public/private figure distinction or adopting a different and much broader subject-matter constitutional standard. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). In

*Rosenbloom*, a plurality of the court extended the actual malice standard to all matters of public interest regardless of the plaintiff's status. In the 1971 *Rosenbloom* plurality, four Justices took the view that the *New York Times* rules should apply wherever a publication concerned any manner of general or public interest, even though the plaintiff was a private person. However, the subject matter analysis of *Rosenbloom* did not command a majority.

Three years later, in *Gertz*, the Court explicitly rejected the *Rosenbloom* issue-oriented approach. In *Gertz*, the Court instead appeared to adopt a test which focused on the status of the plaintiff. In *Gertz*, the plaintiff was labeled as a communist conspirator by the "American Opinion," a publication of the John Birch Society, for serving as attorney for a family whose son was murdered by a Chicago police officer. Rather than analyzing the public interest in the controversy, the court focused on whether the plaintiff was a public or private figure. While ruling that the plaintiff was a private figure and that states were free to establish a fault standard for such private individuals so long as it is not a strict liability standard, *id.* at 345-47, *the Court nevertheless ruled that the First Amendment prohibits awards of presumed and punitive damages unless the plaintiff can prove that the statements were made with actual malice*. The court identified three types of public figures: the involuntary public figure, the general purpose public figure and the limited purpose public figure. *Id.* at 345. The Court justified the distinction between public and private figures on the ground that public figures have greater access to the media and can counteract false statements more effectively, and because most public figures have assumed the risk of misstatements being made about them. *Id.* at 344-45.

The court stated, however, that:

> "Hypothetically, it may be possible for someone to become a public figure through no purposeful

> action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classified as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

*Gertz*, 418 U.S. at 345. Accordingly, instead of eliminating the issue oriented focus of *Rosenbloom*, *Gertz* in fact combined it with a plaintiff status focus, creating what has become an unpredictable and inconsistent formula.

In *Gertz*, the Court held, contrary to hundreds of years of common law, that the First Amendment prohibits awards of presumed damages unless the plaintiff can prove that the statements were made with actual malice. To recover actual damages, the plaintiff need not prove actual malice, but under the First Amendment, states cannot impose liability without fault. *Id.* at 347. *Gertz* was the Court's first extension of the actual malice rule to *private figures*. Prior to *Gertz,* the Court had held that the First Amendment prohibits *public* officials and *public* figures from recovering damages (actual, presumed or punitive) for libel unless the statements were made with actual malice. *Gertz*, 418 U.S. at 334-36 (citing *New York Times,* 376 U.S. at 279 (public officials), and *Curtis*, 388 U.S. at 162 (public figures)).

### B. *Gertz*'s Limitation On Presumed Damages Has Created Substantial Confusion In Deprivation Of The Ninth And Tenth Amendment Rights Of Private Defamation Plaintiffs While Providing A Constitutional Shield For The Reckless Media.

In *Gertz*, the statements at issue constituted libel *per se* under Illinois, and the trial court submitted the case to the jury under instructions that withdrew from its consideration all issues except the existence and amount of presumed damages. The damage award in *Gertz* derived solely from the traditional concept that the sole and exclusive existence of injury could be presumed from the fact of publication without any proof that such harm actually occurred. *Id.* at 328-29, 350.

As set forth below, such *per se* "presumed only" damages bear no resemblance to today's *presumed compensatory damages which flow precisely from the defamatory statements, and are evidenced by much of the same testimony and documentation from which general compensatory damages are determined.* In addition, presumed general damages and general compensatory damages consist of many of the same legal elements as is evidenced by the jury instructions therefor. One of the dangers to private figure plaintiffs seeking compensation for injuries in a negligence case is that general compensatory reputation damages are "inestimable, uncountable and not easily quantified." Moreover, where the jury is instructed that it must not award presumed damages, there exists a real danger that general damages will be rejected as presumed damages. Finally, insofar as compensatory damages are difficult to determine, fears of uncontrolled awards of damages by juries, not only denigrates the good sense of most jurors – it fails to consider the role of trial and appellate courts in limiting excessive jury verdicts where no reasonable relationship exists between the amount awarded and the injury sustained. Available information

tends to confirm that American courts have ably discharged this responsibility. No rational purpose is served by the *Gertz* prohibition. This position is shared by the Supreme Court.

In *Gertz*, the dissent by Chief Justice Burger, Justice Douglas, Justice Brennan and Justice White characterized the plurality opinion as a "radical change in the law and severe invasion of the prerogatives of the States. [*Gertz*] should at least be shown to be required by the First Amendment or necessitated by our present circumstances. Neither has been demonstrated." *Gertz* at 376-77. As Justice White stated in dissent of the *Gertz* plurality:

> "For some two hundred years – from the very founding of the Nation – the law of defamation and right of the ordinary citizen to recover from false publication injuries to his reputation have been almost exclusively the business of state courts and legislatures. Under typical state defamation law, the defamed private citizen has to prove only a false publication that would subject him to hatred, or ridicule. *Given such publication, general damages to reputation was presumed*, while punitive damages required proof of additional facts. . . . But now, using that Amendment as the chosen instrument, the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the fifty States. That result is accomplished by requiring the plaintiff in each and every defamation action to prove not only the defendant's culpability beyond his act of publishing defamatory material but also actual damage to reputation resulting from the publication. . . . I assume the sweeping changes will be popular with the press, but this is not the road to salvation for a court of law. *As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such*

> *wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves.*"

*Gertz* at 359-71 (emphasis added). Justice White went on to state that:

> "In 1938, the Restatement of Torts reflected that historic rule that publication writing form of defamatory material – material tending 'so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him' – subjected the publisher to liability although no special harm to reputation was actually proved. [] Truth was a defense as some libels were privileged; but, given a false circulation, *general damages to reputation was presumed* and damages could be awarded by the jury, along with any special damages such as pecuniary loss and emotional distress. At the very least, the rule allowed the recovery of nominal damages for any defamatory publication actionable *per se* and thus performed 'a vindicatory function by enabling the plaintiff publicly to brand the publication as false. The salutary social value of this rule is preventive in character since it often permits a defamed person to expose the groundless character of a defamatory rumor before harm to the reputation has resulted therefrom.'"

*Id.* at 371-72 (emphasis added). As to the prerequisite that presumed damages in a private figure defamation require malice, Justice White went on to protest the plurality's dismantling of hundreds of years of common law:

> "Damages for libel or slander *per se* included 'harm caused thereby to the reputation of the person defamed or in the absence of proof of such harm, for the harm which normally results from such defamation.' Proof of the defamation itself established the fact of injury and the existence of such damage to the right of reputation, and the

> jury was permitted, even without any other evidence, to assess damages that were considered to be the natural or probable consequence of the defamatory words. [Citations omitted]. *In this respect, therefore, the damages were presumed because of the impossibility of affixing an exact monetary amount for present and future injury to the plaintiff's reputation, wounded feelings and humiliation, loss of business, and any consequential physical illness or pain.*"

*Gertz* at 372-74 (emphasis added). Justice White warned of the danger *Gertz* would pose to individual reputations:

> "The impact of today's decision on the traditional law of libel is immediately obvious and indisputable. No longer will the plaintiff be able to rest his case with proof of a libel defamatory on its face or proof of a slander historically actionable *per se*. In addition, he must prove some further degree of culpable conduct on the part of the publisher, such as intentional or reckless falsehood or negligence. *And if he succeeds in this respect, he faces still another obstacle: recovery for loss of reputation will be conditioned upon 'competent' proof of actual injury to his standing in the community*. This will be true regardless of the nature of the defamation and even though it is one of those particularly reprehensible statements that have traditionally made slanderous words actionable without proof of fault by the publisher or of the damaging impact of his publication. *The Court rejects the judgment of experience that some publications are so inherently capable of injury, and actual injury so difficult to prove, that the risk of falsehood should be borne by the publisher, not the victim*. . . . The Court is clearly right when at one point it states that 'the law of defamation is rooted in our experience that the truth rarely catches up with a lie.' *Ante*, at 344 n. 9. But it ignores what that experience teaches,

> *viz.*, that damage to reputation is recurringly difficult to prove and that requiring actual proof would repeatedly destroy any chance for adequate compensation."

*Gertz*, at 391-92 (emphasis added).

In *Dun & Bradstreet,* 472 U.S. 749 (1985), despite eleven years of consistent judicial confusion and disagreement in trying to understand and apply the limitations and protections of *Gertz*, the Supreme Court added yet another dichotomy to Constitutional libel law. After *Dun & Bradstreet,* the constitutional fault standards defined in *Gertz* for private figures apply only to cases involving speech on an issue of *public concern*. Five Justices agreed that in private figure/private matter cases, the plaintiff is not constitutionally required to prove actual malice to recover presumed or punitive damages. 472 U.S. at 760-61. *Unfortunately, the Court provided little guidance on (1) how to distinguish between public and private concerns, (2) the requisite relationship between the defamatory portions and the public concern and (3) the minimal actual involvement of the plaintiff in the public concern.* Moreover, the Court again confused the notion of "public concern" relevant to the issue of limited purpose public figures and the newly created "public matter" issue under the speech content analysis. Finally, while the Court did hold that plaintiffs in a private/private case need not demonstrate actual malice, it failed to explain whether the Constitution imposes a minimum standard of fault in such cases.

The opinion made clear that there was no media distinction consideration. From its inception, without discussing the issue, the Court has applied the rule of *New York Times* to non-media defendants. *See New York Times,* 376 U.S. at 254, n. 286; *Henry v. Collins,* 380 U.S. 356 (1965); *Garrison,* 379 U.S. 64. This Court has made plain that the organized press has a monopoly neither on the First Amendment nor on the ability to enlighten. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 782

(1978). *See also Pell v. Procunier,* 417 U.S. 817 (1974) (press has no independent First Amendment right of access to prisons). Cf. *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976) (the idea that government can restrict the speech of some elements of society to enhance the relative voice of others is "wholly foreign" to the First Amendment).

Moreover, as in *Gertz,* the analysis of presumed and punitive damages in *Dun & Bradstreet* involved facts generally inapposite to most private figure defamation cases. Specifically, the trial court instructed the jury that the statements at issue were libelous *per se,* and the plaintiff was not required to prove actual damages since damage and loss therefrom were conclusively presumed. 472 U.S. at 754. The jury returned a verdict in favor of plaintiff for $50,000 in presumed damages and $300,000 in punitive damages. *There was no finding of provable compensatory damages. The Court in Gertz was particularly concerned when unrestrained presumed and punitive damages were "unnecessarily" broad,* 418 U.S. at 350, *in relation to the actual damages. As set forth herein, however, where plaintiffs demonstrate some degree of actual damages, additional presumed damages would not be "unrestrained."*

Chief Justice Burger concluded:

> *"I continue to believe, however, that Gertz was ill-conceived, and therefore agree with Justice White that Gertz should be overruled.* I also agree generally with Justice White's observations concerning *New York Times Co. v. Sullivan. New York Times,* however, equates 'reckless disregard of the truth' with malice; this should permit a jury instruction that malice may be found if the defendant is shown to have published defamatory material which, in the exercise of reasonable care, would have been revealed as untrue. But since the Court has not applied the literal language of *New York Times* in this way, I agree with Justice White that it should be reexamined.

> *The great rights guaranteed by the First Amendment carry with them certain responsibilities as well.*
>
> Consideration of these issues inevitably recalls an aphorism of journalism that 'too much checking on the facts has ruined many a good news story.'"

472 U.S. at 764 (emphasis added). Justice White went on to state that:

> "Although rejecting the *New York Times* malice standard where the plaintiff is neither a public official nor a public figure, *there the Court nevertheless deprived the private plaintiff of his common-law remedies, making recovery more difficult in order to provide a margin for error. In doing so, the Court ruled that without proof of at least negligence, a plaintiff damaged by the most outrageous falsehoods would be remediless, and the lie very likely would go uncorrected. And even if fault were proved, actual damage to reputation would have to be shown, a burden traditional libel law considered difficult, if not impossible, to discharge. . . .*
>
> Although there was much talk in *Gertz* about liability without fault and the unfairness of presuming damages, all of this, as was the case in *New York Times*, was done in the name of the First Amendment, purportedly to shield the press and others writing about public affairs from possibly intimidating damages liability. But if protecting the press from intimidating damages liability that might lead to excessive timidity was the driving force behind *New York Times* and *Gertz*, it is evident that the Court engaged in severe overkill in both cases. . . . *I still believe the common-law rules should have been retained where the plaintiff is not a public official or public figure.* As I see it, the Court undervalued the reputational interest at stake in such cases. I

> have also come to doubt the easy assumption that the common-law rules would muzzle the press. But even accepting the *Gertz* premise that the press also needed protection in suits by private parties, there was no need to modify the common-law requirements for establishing liability and to increase the burden of proof that must be satisfied to secure a judgment authorizing at least nominal damages and the recovery of additional sums. . . ."

472 U.S. at 770-72 (emphasis added).

### C. Presumed Damages Are Compensatory In Nature, Are Reasonably Related To The Injury Suffered By Plaintiff And Crucial Given The Peculiar Nature Of Actual Reputation Injury.

"Actual" injury to reputation has traditionally been hard to produce, defies exact measurement and often lacks the type of direct testimony that engendered the "presumed damages" doctrine. However, the inherently amorphous quantification of libel damages potentially enables juries to vary damages awards in accordance with the effect of the defamatory utterance upon the peculiar composition of the plaintiff's reputation. *See* Anderson, *"Reputation, Compensation, and Proof,"* 25 William & Mary L. Rev. 747 (1984). Once a plaintiff offers some concrete, admissible proof that his reputation has been injured, *e.g.*, that an existing relationship has been seriously disrupted, this Court condones the idea that a reputation may be valued and quantified in monetary terms. *Ibid.* Testimony of third parties as to a diminished reputation will also suffice to prove and from which the jury can infer "actual injury." Courts have regularly used this reality to award *de facto* presumed damages. However, until this Court reverses *Gertz* in this regard, consistency will elude the states, the individual and the media.

In *Sisler v. Gannett Co.*, 104 N.J. 256 (1986), plaintiff sued over an article in which defendant reported that a company with which plaintiff was associated was under investigation. Determining the defamatory statements to involve issues of public concern, the court ruled that presumed and punitive damages could not be awarded in the absence of a finding of *New York Times* malice. At trial, plaintiff was awarded $200,000 general damages and $850,000 special damages. Defendants argued that plaintiff adduced no competent evidence at trial of "actual injury" to his reputation, and thus the $200,000 award was, in effect, an award of presumed damages in violation of *Gertz*. Quoting *Gertz*, the court noted that:

> "*We need not define 'actual injury', as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering*. Of course juries must be limited by appropriate instructions and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury."

*Gertz* at 349-50 (emphasis added).

At the trial, *plaintiff* called six reputation witnesses. *These witnesses testified that plaintiff's outstanding general reputation, as well as his excellent reputation* in the horse-breeding, business, and banking communities, *was unaffected by the publication of the three articles.* Because *these witnesses were Sisler's only "direct" evidence relevant to injury to his reputation*, defendant contended that there was no competent proof of actual injury. *Sisler*, 104 N.J. at 280. Nevertheless, the court concluded:

> "*Because of the elusive nature of such evidence*, courts must scrutinize jury damages awards and weigh carefully the type and substance of reputation-injury evidence presented. Courts reviewing jury awards based on lesser evidential showings should be more scrupulous, and less hesitant about reducing the verdicts. *Applying this standard, we find in this case plaintiff presented evidence that his relationship with Guida was permanently impaired by the Courier-News articles.* Moreover, the jury found this evidence persuasive enough to justify an award for special damages. *The jury was entitled to conclude from this evidence that plaintiff suffered general injury to his reputation*, over and above that manifested in the isolated transactions for which it awarded the special damages."

*Sisler*, 104 N.J. at 281 (emphasis added).

Eminent authority has warned that juries must be permitted to draw inferences and permit presumptions when determining actual damages:

> "It is clear that *proof of actual damage will be impossible in a great many cases* where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact."

W. Prosser, *Law of Torts § 112*, p. 765 (4th ed. 1971) (emphasis added).

> "The harm resulting from an injury to reputation is difficult to demonstrate both because it may involve subtle differences in the conduct of the recipients toward the plaintiff and because the recipients, the only witnesses able to establish the necessary causal connection, may be reluctant to testify that the publication affected their relationships with the plaintiff. *Thus some presumptions are necessary if the plaintiff is to be adequately compensated.*"

*Note, Developments in the Law – Defamation*, 69 Harv. L. Rev. 875, 891-92 (1956) (emphasis added).

In determining the amount of such general damage, juries should consider but are not limited to the following:

(1) The extent of the publicity given by the defendant to the libel;

(2) Plaintiff's good name, reputation and the loss thereof;

(3) Plaintiff's shame, mortification, injured feelings and mental suffering;

(4) Plaintiff's *prominence* in the community where he lives;

(5) Plaintiff's professional or business *standing* in the community where he does business.

BAJI 7.10 (1992). Likewise, presumed damages are compensatory damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feelings. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages. An award for presumed damages must be just and reasonable in the light of the evidence. Absent any actual damages, presumed damages may roughly approximate the harm suffered so as to fully compensate for damages impossible to measure. *Memphis Community School District v. Stachura*, 477 U.S. 299, 310-11 (1986).

Presumed and actual damages are so practically identical in assessment that juries often award actual damages in the form of presumed damages because damage to reputation is difficult to quantify. *Snead v. Redland Aggregates,* 994 F.2d 1325, 1331 (5th Cir. 1993). Courts also frequently permit juries to assess presumed damages in public disclosure privacy cases outside the *Gertz* limits. *Nolley v. County of Erie*, 802 F.Supp. 898, 902-04 (1992). "Inferred damages," "presumed damages" and "actual

damages" are often confused in that, among other things, actual injury in the form of injury to reputation and humiliation is not easily quantified. Indeed, general damages are often presumed from the defamation. *Leers v. Green*, 24 N.J. 239, 251 (1957).

Reversal of *Gertz* is made more critical in light of the inconsistent approaches taken by the states and circuits in determining the threshold evidentiary requirements for proving actual damages. Little guidance is available to trial courts in determining the nature of a "public matter." As a result, some courts, as in the case at bar, use the same analysis required in determining a "public concern/controversy" for limited-purpose public figures.

Moreover, while some states permit vague allegations by a few witnesses to go to the jury, others require evidence of quantifiable interference with job or community. *Kenney v. Wal-Mart*, 100 S.W.3d 809 (2003) (survey of various state's requirements for actual damages in defamation actions). Consequently, in a negligence case, under a strict view of actual damages, a plaintiff is without remedy. Moreover, it defies logic that a plaintiff of a deliberate and reckless falsification would have greater need or entitlement to presumed damages than would a negligence plaintiff. Why a defamatory statement is more apt to cause injury if the lie is intentional than when it is only negligent, is beyond comprehension. Judges and juries who must live by these rules will find them equally incomprehensible.

### D. Established Constitutional Principles Will Be Best Served By Reversing *Gertz* And Permitting Private Figure Defamation Plaintiffs To Recover Presumed Damages In A Public Matter Negligence Case.

Chief Justice Burger, in his concurring opinion in *Dun & Bradstreet*, reiterated his strong opposition to *Gertz*'

expansion of *New York Times* into the realm of private figure defamation cases:

> "I dissented in *Gertz* because I believed that, insofar as the 'ordinary private citizen' was concerned, 418 U.S., at 355, the Court's opinion '[abandoned] the traditional thread,' *id.*, at 354-355, that had been the theme of the law in this country up to that time. I preferred 'to allow this area of law to continue to evolve as it [had] up to [then] with respect to private citizens rather than embark on a new doctrinal theory which [had] no jurisprudential ancestry.' *Ibid. Gertz*, however, is now the law of the land, and *until it is overruled*, it must, under the principle of *stare decisis*, be applied by this Court."

472 U.S. at 763-64. Now is the time to overrule *Gertz*.

Also concurring in *Dun & Bradstreet*, Justice White likewise expressed criticism of the *Gertz* Court's extension of *New York Times* to private figures:

> "[I]n *Gertz* [citation omitted], the Court again dealt with defamation actions by private individuals, for the first time holding that such plaintiffs could no longer recover by proving a false statement, no matter how damaging it might be to reputation. They must, in addition, prove some 'fault,' at least negligence [citation omitted]. *Even with that proof, damages were not presumed but had to be proved.* [Citation omitted]. Furthermore, no punitive damages were available without proof of *New York Times* malice [citation omitted]. *This decision, which again purported to implement First Amendment values, seemingly left no defamation actions free from federal constitutional limitations.*
>
> *I dissented in Gertz, asserting that the common-law remedies should be retained for private plaintiffs. I remain convinced that Gertz was erroneously decided.*"

472 U.S. at 766-67 (emphasis added). Justice White concluded:

> "I dissented in *Gertz*, and I doubt that the decision in that case has made any measurable contribution to First Amendment or reputational values since its announcement. Nor am I sure that it has saved the press a great deal of money. Like the *New York Times* decision, the burden that plaintiffs must meet invites long and complicated discovery involving detailed investigation of the workings of the press, how a news story is developed, and the state of mind of the reporter and publisher. [Citation omitted.] That kind of litigation is very expensive. I suspect that the press would be no worse off financially if the common-law rules were to apply and if the judiciary was careful to insist that damages awards be kept within bounds. A legislative solution to the damages problem would also be appropriate. . . . In any event, I cannot assume that the press, as successful and powerful as it is, will be intimidated into withholding news that by decent journalistic standards it believes to be true. . . . I am unreconciled to the *Gertz* holding and believe that it should be overruled."

472 U.S. at 774. The effect of *Dun & Bradstreet* on the constitutional standards of fault that apply in cases involving matters of *private* concern is uncertain and unsupported in constitutional and common law. Smolla, *The Law of Defamation*, n. 9, § 3.04. First, in *New York Times* and *Gertz*, the Court justified the increased protections afforded private figures largely because they neither voluntarily injected themselves into political and social issues of great scrutiny nor did they possess the ability to rebut defamatory statements through media access. 472 U.S. at 756-57. The public-figure analysis rightfully focused on the plaintiffs' role in the controversy on which the defendant commented or reported. The public/private matter issue borne of *Gertz* and its progeny focuses solely

on the "form, content and context of the defamatory speech." 472 U.S. at 761-62. The obvious result of such a distinction is to substantially undercut the protection of private reputation in favor of false and defamatory speech of no moment to First Amendment values or "the informative function asserted by representatives of the organized press." *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972).

The interaction of these two themes under the First Amendment yields four possible combinations, which are by no means static or immutable. Three of these combinations were identified in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986). There, in yet another divided 5-4 decision, Justice Stevens delivered the dissenting opinion, joined by Chief Justice Burger, Justice Rehnquist and Justice White. Critical of the *Gertz* precedent's erosion of private figure protections by undermining and limiting common law recoverable damages, the dissent made clear that:

> "The issue the Court resolves today will make a difference in only one category of cases – those in which a private individual can prove that he was libeled by a defendant who was at least negligent. For unless such a plaintiff can overcome the burden imposed by *Gertz* [citation omitted], he cannot recover regardless of how the burden of proof on the issue of truth or falsity is allocated. By definition, therefore, the only litigants – and the only publishers – who will benefit from today's decision are those who act negligently or maliciously."

475 U.S. at 780.

The four dissenting Justices made clear their antipathy for the Court's erosion of the rights and remedies of private figures:

> "I do not agree that our precedents require a private individual to bear the risk that a defamatory statement – uttered either with a mind toward assassinating his good name or with careless

> indifference to that possibility – cannot be proven false. By attaching no weight to the State's interest in protecting the private individual's good name, the Court has reached a pernicious result."

475 U.S. at 781.

The dissenting Justices understood and rejected the heavy liability and damage burdens of proof placed upon private-figure libel plaintiffs as a result of the over-extension of the *New York Times* doctrine:

> "I simply do not understand [] why a character assassin should be given an absolute license to defame by means of statements that can be neither verified nor disproved. The danger of deliberate defamation by reference to unprovable facts is not a merely speculative or hypothetical concern. Lack of knowledge about third parties, the loss of critical records, an uncertain recollection about events that occurred long ago, perhaps during a period of special stress, the absence of eyewitnesses – a host of factors – may make it impossible for an honorable person to disprove malicious gossip about his past conduct, his relatives, his friends, or his business associates."

475 U.S. at 785. The dissent went on to reject the application of the *Gertz* and *New York Times* tests in private-figure public interest contexts.

> "In libel suits brought by private individuals, in contrast, 'the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain.' To be sure, both categories of cases involve 'speech that matters.' *But '[the] extension of the New York Times test' to every item of public interest 'would abridge this legitimate state interest to a degree that we find unacceptable.'*"

475 U.S. at 789 (citations omitted) (emphasis added). The dissent reiterated the need for new methods for protecting the reputations of private figures:

> "Recognition of the 'strong and legitimate [state] interest in compensating private individuals for injury to reputation,' *id.*, at 348-349, exposes the untenability of the Court's methodology: the burden of proof in 'private-figure' libel suits simply cannot be determined by reference to our precedents having the reputations of 'public figures' in mind."

475 U.S. at 789. The dissenting Justices are in accord with Cross-Petitioner here: "Where private-figure libel plaintiffs are involved, the First Amendment does not [require] us to tip [the scales] in favor of protecting true speech merely because that speech addresses matters of public concern." *Id.*

### E. The Expansion Of *Gertz* Into The Private Figure Implication Context Has Deprived Citizens Of Any Reasonable Remedy For Defamatory Publications.

To appreciate the thrust of the Court's holding in *Gertz*, we must assume that a private-figure libel plaintiff can prove that a story about him was published with "actual malice" – that is, without the publisher caring in the slightest whether it was false or not. Indeed, in order to comprehend the full ramifications of today's decision, we should assume that the publisher knew that it would be impossible for a court to verify or discredit the story and that it was published for no other purpose than to destroy the reputation of the plaintiff. Even if the plaintiff has overwhelming proof of malice – in both the common law sense and as the term was used in *New York Times* – the Court today seems to believe that the character assassin has a constitutional license to defame. 475 U.S. at 785.

The issue presented below is whether *Gertz* requires a private figure defamation plaintiff to prove intent to convey an implication by clear and convincing evidence to recover presumed damages in a public matter defamation. Faced with facts strikingly similar to those presented in this case, the First Appellate District of the Court of Appeal of California, in *Weller v. American Broadcasting Companies, Inc.*, 222 Cal. App. 3d 991 (1991), rejected the notion that, separate and apart from the traditional malice requirement (*i.e.*, clear and convincing evidence the defamatory statements were published with knowledge of falsity or reckless disregard for the truth), plaintiff need also prove, by clear and convincing evidence, that defendant intended to imply the false and defamatory implication.

In *Weller*, a private figure plaintiff recovered presumed and general damages, and was entitled (but not awarded) additional punitive damages based solely on a finding, by clear and convincing evidence, that defendant published the false and defamatory implication with malice. Specifically, the California Court of Appeal ruled that:

> "[T]he only limitation placed on recovery of presumed [and punitive] damages was that the plaintiff must prove that the defamatory statements were published with 'knowledge of falsity or reckless disregard for the truth.' The jury specifically found that Weller met that burden."

*Weller*, 222 Cal. App. 3d at 1015.

There is a split of authority on the issue, and the United States Supreme Court has not resolved the matter. Nevertheless, the Court of Appeal below deviated from California precedent and injected an additional *Gertz* barrier for private figure plaintiff recovery of presumed (and punitive) damages in a public matter implication case by requiring plaintiff to prove, by clear and convincing evidence, not only that the defamatory statements were

published with knowledge of falsity or reckless disregard for the truth, but also that plaintiff prove, by clear and convincing evidence, that defendant intended to imply the false and defamatory implication. Specifically, the Court of Appeal states that:

> "First, the jury's finding that the News-Press *intended to convey* the false and defamatory implication was based upon the preponderance of the evidence standard, *not the more elevated clear and convincing standard required to find actual malice. Additionally*, even if Sharp intended to imply that Ross was investigated for the same frauds as Marlin, this would not demonstrate actual malice. *It must be shown that Sharp knew the implication was false, or entertained serious doubts about its truth.*"

App. 43 (emphasis added).

The Court of Appeal's ruling clearly imposes a second and heretofore unnecessary layer of intent for a private figure plaintiff to recover presumed damages against a media defendant, *i.e.*, that plaintiff prove by clear and convincing evidence that (1) defendant intended to publish the implication, and (2) defendant knew the implication was false, or entertained serious doubts about its truth. The sole support for the "intent to publish" prong, based solely on non-binding authority, inapposite to the instant facts, appears as a footnote to the Court of Appeal opinion:

> "Citing *Newton v. National Broadcasting Co., Inc., supra,* 930 F.2d at page 681 and *Howard v. Antilla* (1st Cir. 2002) 294 F.3d 244 at page 252, the News-Press argues that with regard to implications, to show actual malice, publishers must have intended to convey the defamatory impression, and even if an implication is clear and inescapable to the fact finder, it cannot be said that the journalist intended to leave that impression

> where the testimony shows the journalists had no such intention."

App. 43.

Without review of the Court of Appeal's creation of an "intent to publish" prong, and without clear guidance in evaluating the standard required to demonstrate malice in an implication case, the important constitutional protections provided a private figure defamation plaintiff against the excesses of irresponsible journalists will be significantly eroded.

### F. If This Court Were To Impose An "Intent To Convey" Requirement, Such Rule Should Be Inapplicable In The Instant Case Insofar As The False And Defamatory Implication Was Supported By Identical, Direct Statements.

In the decision below, relying solely on the holdings of *Newton* and *Howard*, *supra*, the Court of Appeal ruled that a presumed damage award could lie only on a jury finding that the News-Press *intended to convey* the false and defamatory implication by the more elevated clear and convincing standard required to find actual malice, in addition to the traditional malice requirement that the News-Press knew the implication was false, or entertained serious doubts about its truth. Such an "intent to imply" prong was not required by the first trial judge and arose in the second trial only at the jury instruction phase. This predicament illustrates yet another inconsistency and ambiguity spawned in the post-*Gertz* era.

Even if this Court were to reject the well-established and unanimously followed principle followed in *Weller* and follow the non-controlling cases of *Newton* and *Howard*, such authority would not mandate the imposition of an "intent to imply" requirement under the facts of the instant case.

As is abundantly clear from a review of the authority relied on by the Court of Appeal below, the facts of the instant case are inapposite to the operative and dispositive facts in *Newton* and *Howard*. Here, as set forth above, the implication is identical to not one, not two, *but three express statements* conveying the same false and defamatory information as that contained in the false and defamatory implication. Moreover, the implication consists of, among other things, those false and defamatory statements.

In *Newton*, the United States Court of Appeals for the Ninth Circuit mandated an intent to imply element because "[t]he challenged material was a true depiction of Mr. Newton's conduct. . . ." (*Newton*, 930 F.2d at 686). Accordingly, as the implication was comprised of all true statements, "in light of the fundamental First Amendment values at stake in *public figure* cases . . ." "to protect First Amendment values from the prejudices of local juries against alien speakers[ ]" the absence of an "intent to publish" element "would permit liability to be imposed not only for what was not said but also for what was not intended to be said." (*Newton* 930 F.2d at 671, 679-681).

Likewise, *Howard* involved a public figure case in which the defamatory implication consisted only of true statements. In fact, Howard involved a false light claim bearing no relevance to the instant matter. "Implications perceived in a statement but not intended by the speaker cannot be actionable *in public official or public figure cases*." (*Howard*, 294 F.3d at 252). *See also Sprague v. American Bar Association*, 2003 U.S. Dist. Lexis 15518 (July 18, 2003) ("where a plaintiff's defamation case depends on innocent, innocuous material comprising a defamatory implication, other circuits have interpreted the appropriate inquiry to be defendant's state of mind." Citing *Howard*, 294 F.3d at 254).

In sum, this Court must determine whether an "intent to convey" requirement will further frustrate private figure defamation plaintiffs from any reasonable ability to obtain presumed (and punitive) damages and under what circumstances.

## II. Conclusion.

The broad rule against presumed damages in private figure negligence defamation cases serves only to insulate the media in contexts least deserving of First Amendment protection. Insofar as the sole focus is the nature of the speech without regard for plaintiff's role therein, a defendant – that "negligently" reports about a private figure plaintiff's erroneous involvement in a "public matter" story in which all triers of fact have found plaintiff played no role – is immune from presumed or punitive damages despite failing to implicate any of the *New York Times* interests.

In the thirty (30) years since *Gertz* came down from this Court, scores of Justices and appellate and trial judges have criticized its expansion into private figure cases, yet never before has the opportunity to overturn *Gertz* been presented to this Court. Now, after fourteen (14) years of litigation, a determined plaintiff has given this Court the opportunity to reign in the overextended principles of *New York Times* and again protect the ordinary citizen's reputational interests and the right of redress for trespass thereon. It may be decades before this opportunity again presents itself to the Court.

Respectfully submitted,

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April 2004

*Petitioner*

*2003 Cal. App. Unpub. LEXIS 9227*

LEONARD M. **ROSS**, Plaintiff, Appellant, and Cross-Respondent, v. SANTA BARBARA NEWS PRESS, etc., et al., Defendants, Respondents, and Cross-Appellants.

B151127

COURT OF APPEAL OF CALIFRONIA, SECOND APPELLATE DISTRICT, DIVISION THREE

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As Modified on Denial of Rehearing October 24, 2003

**COUNSEL:** Leonard M. Ross, in propria persona; Armand Arabian; Glassman, Browning & Saltsman and Anthony Michael Glassman; Adam Scott Bram; and Brent Zadorozny, for Plaintiff, Appellant and Cross-Respondent.

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**JUDGES:** ALDRICH, J. We concur: CROSKEY, Acting P.J., KITCHING, J.

**OPINION BY:** ALDRICH

**OPINION:**

## INTRODUCTION

On November 27, 1988, and on February 28, 1989, the Santa Barbara News-Press (the News-Press) published front-page articles about Leonard M. Ross (Ross) and his potential purchase of a large percentage ownership in Santa Barbara Savings and Loan Association's parent company. Ross filed a civil lawsuit against the News-Press

alleging the two articles were defamatory. Ross contended the articles erroneously implied that he had been investigated by the government for the same investor frauds that had sent his former partner Barry S. Marlin (Marlin) to prison. Ross also contended that the articles contained three false statements.

The second trial resulted in a $2,250,000 jury verdict in favor of Ross. Ross filed an appeal and News-Press filed a cross-appeal. We affirm.

## PROCEDURAL AND FACTUAL SUMMARY

1. *Procedure.*

a. *Initial proceedings and the first trial.*

On November 22, 1989, Ross filed a complaint for defamation.

A jury trial resulted in a $7.5 million verdict against the News-Press. Thereafter, the Honorable Harvey A. Schneider granted the News-Press's motion for new trial because (1) the verdicts were internally inconsistent, and (2) the $2.5 million emotional damages award was excessive.

On appeal, we affirmed the order granting a new trial (Case No. B082419). In rendering our March 24, 1997, decision, we affirmed Ross's private figure status and affirmed the denial of the News-Press's motion for judgment notwithstanding the verdict.

b. *Proceedings upon remand.*

On remand, the case was originally assigned to the Honorable Paul Boland, who ruled on various motions. On

March 8, 2000, the case was transferred to the long cause department. The hearing to consider in limine motions set on March 22, 2000, was vacated, as was the April 10, 2000 trial date. Thereafter, the case was re-assigned, and the Honorable Joseph R. Kalin presided over a bifurcated jury trial.

On the issue of liability, Ross presented his evidence to the jury. The News-Press moved for a directed verdict on the issue of malice, which was granted. The jury rendered verdicts on liability upon special verdicts. The jury found for Ross, finding the three statements and the implication false and defamatory.

The damage phase of the trial proceeded. The jury awarded Ross a total of $2,250,000. Judgment was entered in favor of Ross.

Ross and the News-Press appealed.

2. *Facts.*[1]

a. *Introductory comments.*

The case is based on two front-page articles about Ross that appeared in the News-Press, a daily newspaper published by The New York Times Company. Kathleen Sharp (Sharp) wrote the articles and David McCumber (McCumber) was executive editor.[2] The impetus for the

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[1] We have construed the facts in the light most favorable to the judgment.

[2] The News-Press, The New York Times Company, Sharp, and McCumber are all named as defendants and appear on appeal as respondents and

(Continued on following page)

articles was Ross's attempt to increase his ownership share in the parent company of the Santa Barbara Savings and Loan (Santa Barbara S & L) from 9.9 percent to 24.9 percent. Prior to writing the articles, Sharp conducted an investigation into Ross's background and his activities in trying to make the purchase.

Before detailing the contents of the articles, it is important to describe some events involving Ross.

b. *Ross's background and the events prior to Ross's attempt to purchase a greater share in the Santa Barbara S & L.*

Ross was born in New York. He was raised in the lower eastside in a government housing project. Ross moved to California when he was 16 years old. After graduation from high school, he went to the University of California at Los Angeles (UCLA), where he also attended law school. In November 1968, within a few months of graduating from law school, Ross met Marlin. Ross formed a partnership with Marlin in approximately February 1969. The two designed and sold real estate tax shelter investments. Ross ended his relationship with Marlin in 1971. At that time, Marlin acquired certain assets from Ross, and Ross acquired certain assets from Marlin.

In 1971, Marlin accused Ross of forcibly holding him prisoner while Ross and two thugs examined the business books and records. Marlin alleged he had been struck by a

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cross-appellants. Unless otherwise significant, we collectively refer to these parties as the News-Press.

gun and forced into signing documents that conveyed his interest in certain business ventures to Ross.

From 1972 to 1974 Ross was investigated for violating the Hobbs Act (business taken through extortionate means, 18 U.S.C. § 1951), stemming from Marlin's accusations that Ross had engaged in extortion, kidnapping, and pistol-whipping. This investigation emanated from Marlin's 1971 accusations. Ross was a target of this investigation, which was conducted by the Federal Bureau of Investigation (FBI), a federal grand jury, and the Los Angeles Strike Force of the Organized Crime and Racketeering Section of the United States Department of Justice. The investigation did *not* include charges of fraud. In 1973, Ross testified before the federal grand jury under examination by Justice Department special attorney James A. Twitty (Twitty). In a 1973 report, FBI special agent Wayne W. Hill (Hill) summarized the 1972-1974 probe. At the end of the investigation, no charges were filed against Ross.

In 1976, Marlin was investigated for investor fraud. The investigation was launched by attorney Benjamin F. Green (Green) at the Securities Exchange Commission (SEC). Thereafter, the probe was turned over to the United States Attorney's Office, the United States Postal Inspector, and the Internal Revenue Service (IRS). As a result of the investigation, a multi-count indictment was filed against Marlin in 1977. It accused Marlin of forming and promoting fraudulent investment programs, including real estate syndications from November 1973 to March 1976. Marlin's only defense was that he had been compelled to steal money from investors to pay Ross after Ross forced him to turn over company assets and sign notes to pay for those assets. In 1977, a federal grand jury indicted Marlin.

In 1978, Marlin pled guilty, and thereafter he was imprisoned.

United States Attorney Thomas J. Nolan (Nolan) and Post Office Inspector Herman "Bookie" Almond (Almond) were in charge of the 1976 investigation. Marlin was the target of the inquiry. Ross was not investigated for the crimes that sent Marlin to prison.

In 1977, persons who had invested in limited partnerships and joint ventures promoted by Marlin and Ross filed civil lawsuits against Marlin, Ross, and a number of other individuals and entities. These lawsuits were consolidated into a case styled *Goodrich v. Marlin*. This federal lawsuit alleged that a variety of investment vehicles, from January 1969 through February 1976, were fraudulent and violated the Securities Exchange Act. The third amended complaint alleged that from 1969 to May 1971, Ross was a disclosed principal and Marlin's partner. It also alleged that after Ross and Marlin formally severed their ties in 1971, Ross "remained an undisclosed principal and conspirator with . . . Marlin in the various investment schemes. . . ."

Ross's insurance companies refused to defend these lawsuits. Ross sued his insurers. The insurance companies eventually settled with Ross, paying him $20 million. The investor lawsuits were also settled.

c. *Ross's attempt to purchase a greater share in the Santa Barbara S & L.*

Ross and his wife purchased a home near Santa Barbara. Santa Barbara S & L was the region's largest and oldest savings and loan. In 1988, Ross owned 9.9

percent in the Santa Barbara S & L. Ross received federal regulatory approval to increase his ownership share to 24.9 percent. In 1988, he filed an application with the California Department of Savings and Loan to increase his percentage ownership and was awaiting approval.

In July 1988, Ross spoke at a shareholder's meeting, attended by Patrick O'Hara (O'Hara), the News-Press's business editor. In August 1998, McCumber and O'Hara assigned to Sharp, a business writer, the task of writing a profile about Ross. Sharp investigated for more than three months. During the investigation, Sharp reviewed hundreds of pages of court records pertaining to many lawsuits involving Ross and his companies, a copy of the 1973 FBI report, grand jury transcripts of the 1972-1974 criminal investigation of Ross, and the *Goodrich* complaint. Sharp also talked to approximately 100 people, including Ross and Nolan.[3] Sharp did not examine the Marlin indictment. Sharp wrote numerous drafts of the first article, which eventually appeared on November 27, 1988.

After the first article was published, Ross withdrew his application with the California Department of Savings and Loan. The News-Press published a second article on February 28, 1989. After each article was published, Ross sent a retraction demand.

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[3] Sharp testified that Nolan had told her there was insufficient evidence to prosecute Ross for the crimes that sent Marlin to prison. Nolan's testimony is discussed in section 4.c.(1) of this opinion.

d. *The articles.*

We described the two articles in our first appellate opinion, with appropriate additions and deletions, as follows.

> "The first article appeared on Sunday, November 27, 1988, with the headline 'S & L investor: Inquiries, suits mark career.' It contained 102 paragraphs, plus a sidebar box consisting of a 15-item chronology. The article began with the statement, 'Leonard M. Ross, a real estate investor whose complicated financial affairs have been investigated by several law-enforcement agencies, is seeking to increase his stake in Santa Barbara Savings and Loan Association's parent company to almost 25 percent of outstanding shares.' The next few paragraphs stated Ross had collected $20 million in damages from insurance companies who had defended him in investor lawsuits and his partner, Barry S. Marlin, had been convicted of defrauding investors. The beginning of the article also stated that Ross had denied any wrongdoing and stated he had been unfairly tainted with Marlin's problems.
>
> "In the subsequent paragraphs, the article reported the following. Ross had obtained federal regulatory approval, and was awaiting state regulatory approval, for his proposal to buy shares sufficient to increase his shareholdings from 9.9 percent to 24.9 percent in Financial Corporation of Santa Barbara, the holding company of Santa Barbara [S & L]. Santa Barbara S & L had been troubled in recent years and state regulators were taking a close look at Ross's share-purchase proposal.
>
> "Numerous paragraphs discussed Ross's resolution of investor lawsuits and the fact that

Ross 'pocketed more than $20 million' when he sued his former insurance companies. The balance of the article reported at length the results of the newspaper's study of court documents, transcripts of federal proceedings and comments of various individuals, including comments by Ross and his attorneys. These matters concerned Ross's business affairs during the period 1968 to 1973, and ensuing investigations and litigation, some of which was ongoing at the time of publication. These business affairs derived from Ross's association with Marlin. Ross and Marlin were partners in an investment firm from early 1969 until late 1971, when Ross ['formally severed his business relationship with Marlin. . . .'] The article discussed Marlin's criminal activities, Ross's association with Marlin, the investor frauds committed by Marlin, and the fact Marlin was investigated by governmental agencies for these frauds and eventually incarcerated. Additionally, the article discussed accusations Marlin had leveled against Ross for pistol-whipping, extortion, and kidnapping, claiming Ross had forced him to turn over part of their business ventures. [The article also discussed a case brought by investors, the *Goodrich* litigation, the settlement of this investor lawsuit, as well as the bankruptcy of many of the real estate partnerships.]

"The article contained additional information about Ross, such as he was valedictorian of his law school class at UCLA and lived in the Hearst-Davies mansion in Beverly Hills. It reported one of Ross's attorneys was Howard L. Weitzman, who had represented John DeLorean and Mike Tyson; Ross had successfully sued insurance companies for acting in bad faith [for not

defending him against investor lawsuits]; Ross['s claim that he] had ended his association with Marlin before Marlin began defrauding investors; after investigating Ross's affairs, law enforcement authorities had not accused Ross of any crimes; and investors who sued Ross had never established any wrongdoing on his part.

"The accompanying sidebar chronology began in 1968. The first item stated Ross graduated first in his law school class[. The fourth item stated that from 1972-1976 'Marlin and Ross are investigated by the FBI, as well as by a federal grand jury, a crime strike force, the U.S. Post Office, the Internal Revenue Service, and the Securities Exchange Commission.' The] last item stated in 1988 Ross had settled his bankruptcy case and also applied for approval to purchase additional shares of the Santa Barbara S & L. Marlin is mentioned in eight of the fifteen boxes.

"The second article, captioned 'Rosses drop bid to buy S & L stock,' appeared three months later, on Tuesday, February 28, 1989. It contained only 18 paragraphs. It reported Ross had withdrawn his share-acquisition proposal. It reported the share price had dropped, dividend payments had stopped, and Santa Barbara S & L had lost money in 1988 and planned to make personnel and salary reductions. The article stated that 'as reported by the News-Press recently, Ross has been investigated by a number of law enforcement agencies for alleged fraud. Investors who participated [in the Ross/Marlin syndicates] claim that they were defrauded, [the FBI, the Organized Crime Strike Force, and a federal grand jury] investigated both Ross and Marlin as a result of the allegations, and even though] Marlin had been convicted, Ross was

never . . . charged with a crime or convicted of any wrongdoing.'"

e. *The major factual controversy at the second trial.*

Ross contended three statements in the articles, and an implication found in both articles, were defamatory. This contention was based upon Ross's assertion that although he had been investigated in 1972-1974 for violating the Hobbs Act, he had never been investigated by federal agencies for the investor frauds that resulted in Marlin's incarceration, and that both articles falsely stated or implied to the contrary. The evidence focused on whether there were two separate investigations and which agencies were involved.

The following are the three statements and the implication:

*Statement in the first article:*

(1) [Taken from the sidebar chronology box]: "1972-1976 Marlin and Ross are investigated by the FBI, as well as by a federal grand jury, a crime strike force, the U.S. Post Office, the Internal Revenue Service, and the Securities Exchange Commission."

*Statements in the second article:*

(2) "As reported by the News-Press recently, Ross has been investigated by a number of law enforcement agencies for alleged fraud."

(3) "The Federal Bureau of Investigation, the Organized Crime Strike Force, and a federal grand jury investigated both Ross and Marlin as a result of the allegations."

*The implication.*

As to *both* articles, there was the implication that "Ross was investigated by the government for the same investor frauds that sent his former partner Barry Marlin to prison[.]"

f. *The special verdicts.*

(1) *Liability.*

After the liability phase of the trial, the jury rendered the following special verdicts:

> (1) Ross had proven by a preponderance of the evidence that each of the three statements was false, defamatory, and negligently written by Sharp and McCumber. The News-Press had *not* proven by a preponderance of the evidence that the three statements were fair and true reports of one or more official government records or proceedings.
>
> (2) Both articles implied that "Ross was investigated by the government for the same investor frauds that sent his former partner Barry Marlin to prison[.]" With regard to *both* articles, Ross had proven "by a preponderance of the evidence that [the News-Press] intended to convey the implication . . . ," which was false and defamatory, and which Sharp and McCumber negligently conveyed. With regard to both articles, the News-Press had *not* proven by a preponderance of the evidence that the implication was a "fair and true report of one or more official government records or proceedings[.]"

(2) *Damages.*

After the damages phase of the trial, the jury rendered the following special verdicts.

With regard to the first statement taken from the sidebar chronology, the jury found that Ross had *not* proven by a preponderance of the evidence that the statement caused Ross damage.

The jury found that Ross had proven by a preponderance of the evidence that the other two statements *and* the implication had caused Ross damage.

The jury awarded Ross $2 million for injury to his good name and reputation and $250,000 damages for injuries suffered for shame, mortification, injured feelings, and mental suffering.

## ISSUES RAISED

*The News-Press contends in its cross-appeal:*

1. The law of the case does not preclude a re-examination of whether Ross is a limited public figure.

2. The articles were substantially true.

3. The absolute privilege of a fair and true report applies.

*Ross contends in his appeal:*

1. The trial court erred in granting the News-Press's motion for a directed verdict on the issue of malice.

2. A ruling by Judge Boland precluded Judge Kalin from considering an in limine motion with regard to special damages.

## DISCUSSION

1. *Our conclusion in the first appeal that Ross is a private person and not a limited public figure is law of the case.*

The News-Press contends the law of the case doctrine does not preclude re-examination of the limited public figure issue. This contention is not persuasive.

a. *Additional facts.*

In 1991, prior to the first trial, Ross brought a motion for summary adjudication contending he was a "private person" and not a "limited public figure." The News-Press opposed the motion arguing Ross was a limited public figure. In support of its position, the News-Press pointed to documents reporting that Ross had applied to the California Department of Savings and Loan to increase his ownership interest in the Santa Barbara S & L. The trial court granted the motion, ruling Ross was a private person for purposes of this litigation. On appeal from the first verdict, the News-Press challenged the trial court's ruling.

In our first opinion, filed on March 24, 1997, we examined the legal question of Ross's status. (*Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 264, 965 P.2d 696 [whether a plaintiff is a public figure is question of law for trial court; on appeal, trial court's resolution of disputed factual questions bearing on public figure determination reviewed for substantial evidence].) We delineated the facts, as presented by the parties, including

Ross's personal background and his relationship with, and his attempt to purchase a greater interest in, the Santa Barbara S & L. We discussed facts relevant to whether Ross had injected himself into public forums, such as Ross had never given a press conference, never held or run for public office, and never given public speeches. We included in our recitation of the facts that Ross had "applied to the banking regulatory agencies for permission to increase his ownership share in the Santa Barbara S & L. . . ."

We upheld the trial court's ruling on the summary adjudication motion, and held that for purposes of this case, Ross was *not* a limited public figure. This holding was based upon the following factors. Any controversy was created by the News-Press. Ross had not engaged in conduct he "knew would markedly elevate the chances he would become embroiled in a public controversy. . . . [H]is application with governmental agencies did not convert Ross into a limited public figure, or otherwise everyone who made such a request would lose their private person status. [¶] Additionally, Ross did not act to attract the media or to influence a public debate."

Before the first trial, Judge Schneider had ruled that the California Department of Savings and Loan application was not discoverable pursuant to Financial Code section 8009. After the first appellate opinion and prior to the second trial, there was a dispute as to whether Judge Schneider's ruling was binding. In March 2000, Ross was ordered to produce the entire application.

In the application, Ross revealed that he had a business relationship with Marlin from 1969 to 1971, and in the early 1970's "there had been an investigation of Mr. Ross by the United States Government (U.S. Attorney

Office Strike Force Department, F.B.I., Grand Jury) . . . relating to allegations made by [Marlin] a former business associate. . . . " Ross also revealed that approximately five years later, Marlin was indicted for activities that commenced around November 1973 and continued until 1976, and even though Marlin claimed the activities began in mid-1971 and that Ross was somehow involved, Ross was not named in the Marlin indictment. Ross further revealed that his description of these events was "very summary in nature" and other details could be provided, or, those persons in the federal agencies involved (including Nolan) could be contacted.

The second trial began in January 2001.

b. *The law of the case.*

The doctrine of law of the case precludes re-litigation of legal issues. When an issue of law has been decided by the Court of Appeal or Supreme Court, that rule of law or principle is binding in subsequent proceedings in the lower court and upon subsequent appeal. (*People v. Stanley* (1995) 10 Cal.4th 764, 786-787, 897 P.2d 481; *People v. Shuey* (1975) 13 Cal.3d 835, 841, 120 Cal. Rptr. 83, 533 P.2d 211; *Clemente v. State of California* (1985) 40 Cal.3d 202, 211-212, 219 Cal. Rptr. 445, 707 P.2d 818.) "Application of the rule is now subject to the qualifications that 'the point of law involved must have been necessary to the prior decision, that the matter must have been actually presented and determined by the court, and that application of the doctrine will not result in an unjust decision.' [Citations.]" (*People v. Shuey, supra,* at p. 842; *Clemente v. State of California, supra,* at p. 212.)

Although many circumstances may result in an unjust decision, "there must at least be demonstrated a manifest misapplication of existing principles resulting in substantial injustice. . . ." (*People v. Shuey, supra,* 13 Cal.3d at p. 846; *People v. Stanley, supra,* 10 Cal.4th at p. 787.) A change in the law or a substantial change in the facts may provide reason to revisit an issue. (*Clemente v. State of California, supra,* 40 Cal.3d at p. 212; *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 685, 952 P.2d 218.)

c. *Discussion.*

The News-Press argues that the *contents* of the California Department of Savings and Loan application were not known when we rendered our first opinion and the contents create a sufficient difference in the facts on a matter of great public concern that if we do not revisit the limited public figure issue a great injustice will result. The News-Press argues that in the application Ross distilled the facts, did not make a distinction between the different investigations, and "armed with this disclosure, this Court now should find that [Ross's] 'status' did in fact 'invite public attention such that he relinquished his concerns about his name.'" This argument is unpersuasive.

As stated above, prior to rendering the first appellate decision, we had been made aware of, and considered, the filing of the application. We concluded that the effect of the application did not convert Ross into a public figure. This result is not altered because Ross's application statements about the two investigations are not precise. The News-Press has not demonstrated how this "new" information would have increased the public's attention as to Ross. The

News-Press has not demonstrated that the *contents* of the application changed substantially the limited public figure discussion.[4]

Second, the News-Press has waived its right to suggest that the issue should be revisited. Before the first trial, in opposing the summary adjudication motion, the News-Press did not argue that the *contents* of the application were necessary before the limited public figure issue could be addressed. In March 2000, prior to the second trial, Ross was ordered to produce the entire application. The second trial did not begin until January 2001. At no time during this 10-month period of time, nor at any time during the lengthy second trial, did the News-Press suggest that the application's contents were relevant to the limited public figure issue or that the issue should be re-addressed. Rather, the News-Press's actions were consistent with a February 17, 2000, letter in which the

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[4] In addition to cases we discussed in the first appellate opinion, the News-Press relies heavily upon *Mosesian v. McClatchy Newspapers* (1991) 233 Cal. App. 3d 1685, 285 Cal. Rptr. 430 to show the significance of an application to a governmental agency in a limited public figure discussion. However, *Mosesian* involved a situation very different from the one before us. The plaintiff was a limited public figure because he had become "deeply embroiled by his own efforts in a public controversy over his application and at every opportunity thrust[ ] himself into the center of the dispute to influence the decision makers as to the merits of the application. . . ." (*Id.* at p. 1701; cf. *Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1190; compare *Greenbelt Pub. Assn. v. Bresler* (1970) 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537; *Girod v. El Dia, Inc.* (D. Puerto Rico 1987) 668 F. Supp. 82; *Trans World Accounts, Inc. v. Associated Press* (N.D. Cal.1977) 425 F. Supp. 814.)

News-Press specifically stated that it would *not* revisit the limited public figure issue.[5]

Third, adhering to the law of the case does not result in a substantial injustice. The News-Press suggests it is unfair to deny it the right to revisit the issue because it was foreclosed from looking at the application by Ross's refusal to release it. However, this argument misconstrues the procedural history of this case. Prior to the first trial, Judge Schneider ruled that the application was not discoverable pursuant to Financial Code section 8009. Prior to the second trial, there was a dispute as to whether Judge Schneider's ruling was binding. After a motion to compel, the document was produced. Thereafter, the News-Press had months before the second trial to raise the issue, yet it did not do so.

Lastly, the News-Press contends the law of the case should not apply because this case involves the First Amendment and a savings and loan, is a matter of important public concern, and pure issues of law may be reviewed for the first time on appeal. For this proposition, the News-Press relies heavily upon a decision of the Arizona Supreme Court, *Dombey v. Phoenix Newspapers, Inc.* (Ariz.1986) 724 P.2d 562 [150 Ariz. 476].

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[5] The February 17, 2000, letter was submitted to this court by Ross in a supplemental appendices. The News-Press brought a motion to strike contending we could not consider the letter because it had not been presented to the trial court. We granted the motion to strike. At oral argument, the parties stipulated to the authenticity of the letter. In the interests of justice, on our own motion, we have taken this letter as evidence. (Code Civ. Proc., § 909; *Conservatorship of Hart* (1991) 228 Cal. App. 3d 1244, 1259, 279 Cal. Rptr. 249.)

In *Dombey,* the issue as to whether the plaintiff in a defamation lawsuit was a public figure was raised *sua sponte* by the Arizona Supreme Court. (*Dombey v. Phoenix Newspapers, Inc., supra,* 724 P.2d at p. 568.) The Arizona Supreme Court concluded the issue had not been waived because it was of statewide importance and involved free speech issues of constitutional dimension. (*Id.* at pp. 567-569.) However, in its conclusion, *Dombey* stated that issues not properly raised by the parties would not be considered if they "have been intentionally and clearly waived by the parties." (*Id.* at p. 569.) Here, the News-Press clearly waived the issue.

We agree with *Dombey* and the News-Press that issues of constitutional dimension deserve careful review and that some cases and issues are of public concern, beyond the battle between the parties. However, acceptance of the News-Press's argument would give free rein to news media defendants to unearth and bring forth new facts about a plaintiff's background regardless of the stage of the proceedings, and would enable the media defendant to revisit repeatedly a pivotal issue in every defamation case – the status of the plaintiff.

The law of the case has established that Ross is a private person for purposes of this case.

2. *There is substantial evidence to support the jury's findings with regard to substantial truth.*

The News-Press contends the challenged statements and the implication are not actionable because they are substantially true. This contention is not persuasive.

a. *Applicable law.*

"The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. [Citations.] It overlooks minor inaccuracies and concentrates upon substantial truth. As in other jurisdictions, California law permits the defense of substantial truth and would absolve a defendant even if [he or] she cannot 'justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.' [Citations.] . . . Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' [Citations.] Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' [Citations.]" (*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 516-517, 115 L. Ed. 2d 447, 111 S. Ct. 2419; *Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 687.)

Thus, defects on minor matters do not render an article defamatory if the substance is true. However, to be substantially true, the "proof of truth must go to the precise conduct or characteristic asserted." (Sack, Libel, Slander, and Related Problems (3d ed. 2002) § 3.9, p. 3-23.) A statement is not substantially true if "the conduct alleged is substantially different from the conduct in which the plaintiff in fact engaged. [¶] Proof that a man or woman breached a fiduciary duty, for example, is not proof that he or she was a 'thief' or an 'embezzler.' Proof that the plaintiff is under administrative investigation does not establish the truth of the published allegation that he was under criminal investigation. And if a plaintiff was alleged

to have committed a burglary, he or she need only prove that he or she did not burgle. It is no defense to the libel action to prove that the plaintiff committed a murder, although not surprisingly that fact may well have a substantial effect on the damages to which the plaintiff is entitled." (*Id.* § 3.9, pp. 3-23 – 3-24, fns. omitted.)

The fact that some parts of an article are true, will not foreclose the plaintiff from recovery if any material part of the publication is false. (*Shumate v. Johnson Publishing Co.* (1956) 139 Cal. App. 2d 121, 132, 293 P.2d 531.) Further, if a statement is literally accurate, but has a false implication, defamation may be proven. (*Kapellas v. Kofman* (1969) 1 Cal.3d 20, 33, 81 Cal. Rptr. 360, 459 P.2d 912; *Selleck v. Globe International, Inc.* (1985) 166 Cal. App. 3d 1123, 1131, 212 Cal. Rptr. 838.) The placement of facts in an article can result in a defamatory implication. (*Kapellas v. Kofman, supra,* at p. 33.)

b. *Burden of review.*

At trial, plaintiffs have the burden to prove that a statement or implication is false. (*Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 776, 89 L. Ed. 2d 783, 106 S. Ct. 1558; *Lundell Mfg. v. American Broadcasting Companies* (8th Cir. 1996) 98 F.3d 351, 357.) "In libel actions in which the questioned statement is susceptible to several interpretations, the initial function of the court is to determine whether the publication could reasonably have been understood to have a libelous meaning. It then becomes the jury's function to determine from the evidence which of the potential meanings was actually drawn by the readership. [Citations.]" (*Kapellas v. Kofman, supra,* 1 Cal.3d at p. 34, fn. 14.) In making this inquiry, the publication is

not evaluated under the microscope of persons " 'trained in the law, but by the natural and probable effect upon the mind of the average reader.' [Citation.]" (*Morningstar, Inc. v. Superior Court, supra,* 23 Cal.App.4th at p. 688.)

On appeal, we review the jury's conclusions as to falsity and substantial truth under the substantial evidence standard of review. (*Meloff v. New York Life Ins. Co.* (2d Cir. 2001) 240 F.3d 138, 146 ["What better group of 'average listeners' than a panel of jurors, the proverbial jury of one's peers? As the standard of review requires us to credit the plaintiff with every possible inference a juror could draw. . . ."]; *Smith v. Des Moines Public Schools* (8th Cir. 2001) 259 F.3d 942, 946-947.)[6]

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[6] In our first appellate opinion, the News-Press contended the issue of substantial truth was an ultimate constitutional question of law demanding an independent review. We assumed, but did not decide, that an independent review was required. We were unable to reach a conclusion on the issue because the first jury's verdicts were inconsistent and there were controverted facts regarding the two federal investigations.

Prior to the start of the second trial, when Judge Kalin was ruling on in limine motions, the News-Press conceded that the substantial truth issue was for the jury to decide. In this appeal, the News-Press argues that we may decide the issue as a matter of law because the facts presented by SEC attorney Green and those found by us in the first opinion, result in a record of undisputed evidence. (*Lundell Mfg. v. American Broadcasting Companies, supra,* 98 F.3d at pp. 355-359 [when underlying facts as to gist and sting of defamatory charge are undisputed, court may determine substantial truth as matter of law, otherwise sufficiency of evidence analysis applies in case brought by private plaintiff against media defendant].)

Given the depth and breadth of the dispute contained in this voluminous record, the numerous factual battles, the conflicting inferences that can be drawn from many facts, and the ambiguity,

(Continued on following page)

c. *There is substantial evidence to support the jury's findings that the statements and the implication were false.*

Numerous witnesses testified that there were two, distinct, governmental investigations: (1) the 1972-1974 investigation of Ross for violating the Hobbs Act; and (2) the 1976 investigation of Marlin for investor fraud.

Twitty, special attorney with the Department of Justice's organized crime section and the strike force, FBI special agent Hill, and Richard Patrick Crane (Crane), an attorney with the Department of Justice assigned to the strike force, were involved in the 1972-1974 investigation of Ross for violating the Hobbs Act. All testified unequivocally that the 1972-1974 investigation was aimed solely at Marlin's accusations that in 1971 Ross had committed extortion, kidnapping, and pistol-whipping relating to the transfer of business interests. These witnesses all testified that the investigation *never* involved accusations of investor fraud. They all testified that Ross was the target and subject of the 1972-1974 inquiry and that neither the SEC, the IRS, nor the Post Office were involved.

The 1976 investigation was begun at the SEC. SEC attorney Green led the inquiry. Green testified that when inquiries began, all facts were marshalled to learn who was involved and what happened, when. Green testified that Ross's name arose and Ross was looked at because Ross had been Marlin's partner. Further, when sworn testimony was taken, Ross and others were asked about

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significance, effect, and substance of Green's testimony, we cannot state that the facts are undisputed.

Ross's relationship with Marlin. Green explained that the SEC obtained records from Property Acquisition and Development, an entity that had been jointly owned by Marlin and Ross. The SEC never requested documents from Ross. Ross's name was not on the SEC's formal notice of inquiry, nor was it on a list of individuals Green considered suspects.

Thereafter, the case was shifted from the SEC to the United States Attorney's Office for a criminal probe. The case was first handled by Assistant United States Attorney Terry W. Bird, and thereafter, by Assistant United States Attorney Nolan. Nolan was assisted primarily by Postal Inspector Almond. Nolan and Almond, unequivocally testified that neither they nor any of the other agencies involved, investigated Ross for the investor frauds that sent Marlin to prison. The target and subject of the inquiry was Marlin. Ross's records were not subpoenaed and he was not called before the grand jury. Ross's name was mentioned in the investigation because he had been associated with Marlin and also because Marlin had raised Ross's name in defense. In 1977, a multi-count indictment was filed against Marlin. It related solely to activities commencing in 1973, after Ross and Marlin's relationship had been severed, and ending in 1976.

We agree with the News-Press that had the articles simply mislabeled the investigative agencies, the false statements would not have been actionable, as the difference would been minor and would not have had a different effect on the average reader.

However, the articles did more than confuse the governmental entities. The challenged statements and implication made other errors that were not slight nor

minor errors in detail. There was a substantial difference in the truth. The articles wrongly stated or implied that Ross had been investigated by enforcement agencies for the same investor frauds for which Marlin was incarcerated.

As shown by the jury's special verdicts, the jury necessarily found that Ross was *not* investigated by federal agencies for the investor frauds for which Marlin was imprisoned. There were two separate, distinct, and noncontinuance inquiries relating to two separate, distinct, and noncontinuance events. Ross was the subject of the first investigation. This investigation related to activities in 1971 and had nothing to do with accusations of investor frauds. Marlin was the subject of the second investigation, which was for investor frauds that occurred after Ross had severed his relationship with Marlin. The fact that Ross's name arose when the circumstances surrounding Marlin's criminal activities were examined in 1976, did not indicate that Ross was also investigated at that time. The 1976 investigation led to Marlin's incarceration. The jury reasonably concluded that in the minds of the average reader, it was substantially worse for Ross to be linked to a governmental, criminal investigation for investor fraud that led to Marlin's incarceration, than linked to a prior investigation that did not lead to any charges being filed against Ross, particularly when the prior investigation was based on allegations made by Marlin, now a convicted felon and Ross's ex-partner.

The News-Press argues that the above analysis is too narrow as it limits the term "'investigate'" to one who was the "'subject'" or "'target'" of the governmental inquiry even though "no average reader would parse language this way." The News-Press points to dictionary definitions of

"investigate" which are to trace, search, examine, and inquire. The News-Press then argues Ross was "investigated" because inquiries were made about him.[7] (Cf. *Simonson v. United Press Intern., Inc.* (7th Cir. 1981) 654 F.2d 478, 481-482.)

This argument was rejected by the jury. It was reasonable for the jury to conclude that to an average reader, when a governmental agency "investigated" it did so because that agency had some basis to believe that the person was culpable. The agency's resources were used to determine if that belief was supportable. Since the facts and circumstances surrounding accusations were to be examined, others involved in the scenario would always be discussed in the process. It was reasonable for the jury to conclude that such background inquiries did not mean that everyone involved or mentioned had been "investigated," as they were not the "target" or "subject" of the inquiry.[8]

The News-Press also contends the gist and sting of the articles was true, arguing as follows: Ross was investigated by federal law enforcement agencies in the 1970's for

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[7] The trial court took judicial notice of the dictionary definitions of "investigate" found in three dictionaries.

[8] On appeal, the News-Press contends, as a matter or law, that the implication was not false. The foundation for this contention is that the articles expressly noted that Ross had denied being involved in Marlin's swindle, Ross maintained his innocence of any wrongdoing that sent Marlin to prison, Ross stated he had not been mentioned in the Marlin indictment, and Ross stated he only knew about the investment swindle from newspaper articles. These statements attributed to Ross do not, as a matter of law, destroy the reasonably inferable conclusion that the content of the articles were manipulated to create the false implication. (*Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 803-807, 163 Cal. Rptr. 628, 608 P.2d 716 [discussing implications].)

serious crimes in connection with his business dealings with Marlin, but no charges were brought against him. "[A]verage Santa Barbara readers would not have seen a significant difference between the newspaper's report that plaintiff was investigated for alleged white collar financial crimes and thuggery between 1972-1976 and the documents' report that plaintiff was investigated for alleged white collar financial crimes and thuggery in 1972-1974. These average readers would conclude . . . that the 'distinction between the U.S. Attorney's Office and the Strike Force would be of little significance.'"

The News-Press's argument suggests an average reader would equate the 1972-1974 investigation precipitated by Marlin's accusations *against Ross,* with the investigation begun two years later *against Marlin,* for totally different activities. However, while the events had many of the same players, it was reasonable for the jury to conclude that the accusations underlying each investigation were dissimilar.[9] The juxtaposition of the words in the articles continually connect Ross to Marlin's criminal frauds.

There is substantial evidence to support the jury's findings that the challenged statements and the implication were not substantially true.

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[9] To the extent the News-Press's argument can be construed as an incremental harm argument, it is not persuasive. The News-Press cites no California cases applying the incremental harm doctrine in California. The Ninth Circuit has stated that this doctrine is fundamentally flawed and "not an element of California libel law." (*Masson v. New Yorker Magazine, Inc.* (9th Cir. 1992) 960 F.2d 896, 899, on remand from the Supreme Court, *Masson v. New Yorker Magazine, Inc., supra,* 501 U.S. 496.)

3. *The trial court did not err in denying the News-Press's motion for summary adjudication based upon the fair and true report privilege.*

The News-Press contends the trial court erred in denying its motion for summary adjudication based upon the fair and true report privilege. This argument is unpersuasive.[10]

a. *Additional facts.*

The News-Press brought a motion for summary adjudication alleging it could not be liable because the articles were privileged as fair and true reports of public proceedings. (Civ. Code, § 47, subd. (d).) On June 1, 1999, Judge Boland denied the motion.

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[10] The News-Press phrases this issue in terms of an error by the trial court in denying its motion for summary adjudication. An order denying a motion for summary judgment (or for summary adjudication) is not an appealable order. (Code Civ. Proc., §§ 904.1, 906; cf. *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 412, 981 P.2d 79 (conc. & dis. opn. of Kennard, J.).) There is authority supporting the proposition that such orders are reviewable from final judgments. (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 753 [not addressing the substantive issue but stating "An order denying partial summary judgment is a nonappealable order although reviewable on appeal from the final judgment."]; *Maryland Casualty Co. v. Andreini & Co.* (2000) 81 Cal.App.4th 1413, 1425; compare *Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830 and *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 907-908, with *Sierra Craft, Inc. v. Magnum Enterprises, Inc.* (1998) 64 Cal.App.4th 1252, 1256 [reviewable only upon writ].) However, some authority states that a denial of a summary judgment motion should be addressed only when the party raising the issue can show prejudice. (E.g., *Waller v. TJD, Inc., supra.*)

For purposes of this appeal, we assume the News-Press may raise the issue of the fair and true reporting privilege.

Upon special verdicts, with regard to each of the three statements and with regard to the implication, the jury found that the News-Press had *not* proven by a preponderance of the evidence that the statements or the implication were fair and true reports of one or more official government records or proceedings.

b. *The fair and true reports privilege.*

Civil Code section 47, subdivision (d) creates an absolute privilege for fair and true reports of official proceedings, including remarks and statements made in the scope of judicial, legislative, or other public official proceedings. (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 242-243; *McClatchy Newspapers, Inc. v. Superior Court* (1987) 189 Cal. App. 3d 961, 976-977, 234 Cal. Rptr. 702.) The parties concede this includes coverage of Department of Justice reports, FBI reports, grand jury testimony, and civil lawsuits.

"The rationale for the privilege is of considerable vintage, but remains as relevant as ever: The reporter is a surrogate for the public, permitting it to observe through the reporter's eyes how the business of government is being conducted." (Smolla, Law of Defamation, § 8:67, p. 8-44.3, fn. omitted.) "Most official proceedings must be condensed and summarized in reports about them to the general public, and perfect accuracy in recounting the proceedings is not required." (*Id.* at § 8:76, p. 8-57.) The press is permitted flexibility in the choice of words and need not quote the source material verbatim, as long as the language used is substantially in accord with the source material. (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 262, fn. 13, 208 Cal. Rptr. 137, 690

P.2d 610; *Jennings v. Telegram-Tribune Co.* (1985) 164 Cal. App. 3d 119, 125, 210 Cal. Rptr. 485.)

Publications are absolutely privileged as long as they capture the gist or sting of the official reports from which they obtained information, as measured by the probable affect of the average reader. (Civ. Code, § 47, subd. (d); *Kilgore v. Younger* (1982) 30 Cal.3d 770, 777, 180 Cal. Rptr. 657, 640 P.2d 793.)[11] The question is whether the report fairly reflects the official proceedings, not whether the report is fair to the plaintiff in the sense of providing the plaintiff's version of the events or resolving the merits of the charges. (*Rollenhagen v. City of Orange* (1981) 116 Cal. App. 3d 414, 427, 172 Cal. Rptr. 49 (overruled on other grounds in *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 738, 257 Cal. Rptr. 708, 771 P.2d 406).) However, the reporter may not pick and choose parts of the source material. True statements cannot be juxtaposed,

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[11] Numerous cases have found the absolute privilege applicable. (E.g., *Kilgore v. Younger, supra,* 30 Cal.3d 770 [article fairly connected plaintiff to organized crime]; *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1050, fn. 6 [article stated district attorney had opened criminal probe of plaintiff and obtained search warrant; actually, state auditor had requested warrant]; *Handelsman v. San Francisco Chronicle* (1970) 11 Cal. App. 3d 381, 90 Cal. Rptr. 188 [civil complaint for conversion reported as accusations of theft]; *Crane v. The Arizona Republic* (9th Cir. 1992) 972 F.2d 1511, 1520-1521 [confusing the United States Attorney's Office with the Organized Crime Strike Force]; *Jennings v. Telegram-Tribune Co., supra,* 164 Cal. App. 3d 119 [article reported plaintiff had been convicted of tax fraud and tax evasion when he had pled guilty to knowingly failing to file tax returns]; *Hayward v. Watsonville Register-Pajaronian and Sun* (1968) 265 Cal. App. 2d 255, 71 Cal. Rptr. 295 [article stated plaintiff previously sentenced to prison for a check charge, when plaintiff had been sent to reformatory].)

garbled, or fragmented such that they create false impressions. (*Crane v. The Arizona Republic, supra,* 972 F.2d at pp. 1522-1523; *Dameron v. Washington Magazine, Inc.* (D.C. Cir. 1985) 250 U.S. App. D.C. 346, 779 F.2d 736, 739.)

"The privilege is similarly unavailable where the report is written in such a manner that the average reader would be unlikely to understand the article (or the pertinent section thereof) to be a report on or summary of an official document or proceeding. It must be apparent either from specific attribution or from the overall context that the article is quoting, paraphrasing, or otherwise drawing upon official documents or proceedings." (*Dameron v. Washington Magazine, Inc., supra,* 779 F.2d at p. 739; *Ditton v. Legal Times* (E.D.Va. 1996) 947 F. Supp. 227, 230.)

In California, if the reporter presents a fair and true summary of the official records and proceedings, the privilege applies regardless of whether the article or communication was made with common law malice. (*Howard v. Oakland Tribune* (1988) 199 Cal. App. 3d 1124, 1128, 245 Cal. Rptr. 449; *Green v. Cortez* (1984) 151 Cal. App. 3d 1068, 1074, 199 Cal. Rptr. 221.)

c. *Burden of review.*

Summary judgments must be granted when there are no disputed issues of fact. If different inferences can reasonably be deduced from the evidence, summary judgment is not appropriate. (Code Civ. Proc., § 437c, subd. (c).)

California cases have decided the fair and true issue as a matter of law when no reasonable minds could differ on the issue. Thus, summary judgments, demurrers, and

nonsuits have been affirmed in favor of media defendants. (*Kilgore v. Younger, supra,* 30 Cal.3d 770 [demurrer]; *Howard v. Oakland Tribune, supra,* 199 Cal. App. 3d 1124 [summary judgment]; *Jennings v. Telegram-Tribune Co., supra,* 164 Cal. App. 3d 119 [nonsuit]; *McClatchy Newspapers, Inc. v. Superior Court, supra,* 189 Cal. App. 3d 961 [writ granted directing entry of summary judgment]; *Green v. Cortez, supra,* 151 Cal. App. 3d 1068 [demurrer]; *Hayward v. Watsonville Register-Pajaronian and Sun, supra,* 265 Cal.App.2d 255 [summary judgment]; *Dorsey v. National Enquirer, Inc.* (9th Cir. 1992) 973 F.2d 1431 [affirming summary judgment in favor of Enquirer; no dispute about what occurred in the judicial proceedings and the reasonable inferences all led to the same conclusion]; cf. *Braun v. Chronicle Publishing Co., supra,* 52 Cal.App.4th at pp. 1049-1052 [SLAPP motion].)

When reasonable minds can differ as to whether the report was fair and true, summary judgment is denied and the issue is properly sent to the jury, which decides the issue. (*Handelsman v. San Francisco Chronicle, supra,* 11 Cal. App. 3d at p. 386 [proper to let jury decide effect produced by the words on the reader and if item was fair]; *Pierce v. San Jose Mercury News* (1989) 214 Cal. App. 3d 1626, 1634, 263 Cal. Rptr. 410 [reversing summary judgment "where, as here, reasonable minds could disagree on what is fair, the issue is a question of fact to be determined by the jury."]; *Rollenhagan v. City of Orange, supra,* 116 Cal. App. 3d at p. 428 [where there is any evidence of lack of fair report, correct procedure is to present issue to jury]; *Crane v. The Arizona Republic, supra,* 972 F.2d at pp. 1522-1523 [reasonable jury could conclude effect of the juxtaposed denials materially altered gist and sting]; cf. *Green v. Cortez, supra,* 151 Cal. App. 3d at p. 1073 [fair

and true ordinarily question of fact, but resolved on demurrer when plaintiff stipulated he could not allege inaccurate reporting]; compare with *McClatchy Newspapers, Inc. v. Superior Court, supra,* 189 Cal. App. 3d at p. 976 [stating *Handelsman's* discussion was dicta].)

d. *There is substantial evidence to support the jury's finding that the articles were not fair and true reports.*

The News-Press contends that the statements in the articles, as well as the implication, found their genesis in items that Sharp fairly reported. The News-Press argues that even if there were inaccuracies, it was absolutely privileged to publish the articles because to the average reader, the gist and sting of the articles was that Ross "was investigated [for serious crimes] by federal agencies, that the investigations focused on his dealings with his former partner Marlin, and that the investigation included fraud and extortion allegations."

During Sharp's three-month inquiry into Ross's background, she discovered and reviewed the 1973 FBI report emanating from the 1972-1974 investigation, Ross's grand jury testimony taken in 1973, other grand jury testimony elicited by SEC attorney Twitty, as well as the *Goodrich* complaint.

The FBI report included information about Ross and Marlin's relationship and their investments, as this was the background for Marlin's accusations. When Ross appeared before the grand jury in 1973, he invoked his Fifth Amendment privilege when asked about these investments. In the *Goodrich* complaint, there were

accusations that investors were defrauded by both Ross and Marlin, from January 1969 through February 1976.

The News-Press cannot state that the challenged statements and implication fairly reported the FBI report and grand jury testimony as these documents were prepared years before the 1976 investigation of Marlin. Further, the statements about Ross in these items can reasonably be described as background information. The 1973 FBI report designated Ross as the potential criminal, and Marlin as the victim. The 1972-1974 investigation was not directed at charges of investor fraud. Neither Ross nor Marlin were investigated at that time for investor fraud. It was reasonable for the jury to conclude that the gist and sting of the articles was that due to a fraud investigation of both Ross and Marlin, Ross's former partner went to jail, while Ross, did not. Thus, it was reasonable for the jury to conclude that the articles were not truthful, as they reported an investigation that never occurred.

The News-Press also argues that the articles fairly reported the contents of the *Goodrich* complaint. However, this civil lawsuit did not involve a criminal investigation, nor did it result in anyone's incarceration.

Even if the fair and true report privilege permits flexibility and literary license, neither the FBI report, grand jury transcripts, nor the *Goodrich* complaint stated that Ross was investigated by governmental agencies for the investor crimes that sent Marlin to prison. The jury reasonably concluded that the articles were not fair nor true because they intertwined two, distinct, federal investigations. The jury reasonably concluded that the articles were not fair abridgements as they suggested Ross was a

target of the 1976 inquiry that eventually led to the incarceration of Marlin.

Additionally, the jury could reasonably have concluded that the articles were not fair because while they were supposed to profile Ross, they unduly focused on Marlin and his criminal activities. The articles are replete with references to Marlin and Marlin's eventual incarceration. Only after drawing the false implication, does the first article address the 1972-1974 Hobbs Act investigation, which provides the basis for the News-Press's fair and true argument. The second article never specifically mentions the Hobbs Act investigation.

We acknowledge that different inferences could be drawn from the facts. The FBI report contained statements of unlawful activity by Ross and Marlin, including allegations of diverting money from investors. Questions posed to Ross in the 1973 grand jury pertained to his investments with Marlin. The civil investor lawsuit targeted both Ross and Marlin for activities beginning in 1969. Other statements in the documents also can be excised to support the News-Press's position. However, it was not unreasonable for the jury to conclude that the News-Press's characterization of the proceedings unfairly dissected the data, pulled out bits and pieces, did not evaluate the statements in context, and inaccurately summarized the proceedings. It was not unreasonable for the jury to conclude that the articles were unfair because the information contained therein was garbled, leaving the readers with a false impression.

Additionally, to be a fair attribution, articles must indicate that the reported information came from an official source. (*Dameron v. Washington Magazine, Inc.*,

*supra,* 779 F.2d at p. 739; *Ditton v. Legal Times, supra,* 947 F.Supp. at p. 230.) The first article might satisfy this mandate as it stated that documents had been reviewed. However, the second article contains no attribution. There is no statement in the second article that the information reported therein came from official sources. There is no language in the second article from which it reasonably can be understood that the article is based upon official sources. (Cf. *Medico v. Time, Inc.* (3d Cir. 1981) 643 F.2d 134, 139, fn. 17.)

The trial court did not err in denying the motion for summary adjudication and there is substantial evidence to support the jury's findings with regard to the fair and true report privilege.

4. *The trial court did not err in directing a verdict in favor of the News-Press on the issue of actual malice.*

Ross contends the trial court erred in directing a verdict for the News-Press with regard to the issue of actual malice. This contention is not persuasive.

a. *Actual malice.*

In defamation lawsuits, the status of the plaintiff is a pivotal issue as it delineates the plaintiff's burden of proof. If the plaintiff is a private figure, the states are free to define the standards of liability, provided it is not imposed without fault. (*Khawar v. Globe Internat., Inc., supra,* 19 Cal.4th at pp. 273-274; *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 347, 41 L. Ed. 2d 789, 94 S. Ct. 2997.) California "has adopted a negligence standard for private figure plaintiffs seeking compensatory damages in

defamation actions. [Citation.]" (*Khawar v. Globe Internat., Inc., supra,* at p. 274.)

With regard to punitive damages, however, "even a private figure plaintiff must prove actual malice if the defamatory statement involves matters of public concern. [Citations.]" (*Khawar v. Globe Internat., Inc., supra,* 19 Cal.4th at p. 274; *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at p. 349.)

A defamatory statement is made with "actual malice" when it was made "'with knowledge that it was false or with reckless disregard of whether it was false or not.' (*New York Times Co. v. Sullivan* [(1964)] 376 U.S. 254, 280, 11 L. Ed. 2d 686, 84 S. Ct. 710. . . .)" (*Khawar v. Globe Internat., Inc., supra,* 19 Cal.4th at p. 275.) "[T]he publisher of a defamatory statement acts with reckless disregard amounting to actual malice if, at the time of publication, the publisher 'in fact entertained serious doubts as to the truth of his publication.' (*St. Amant v. Thompson* (1968) 390 U.S. 727, 731, 20 L. Ed. 2d 262, 88 S. Ct. 1323. . . .)" (*Khawar v. Globe Internat., Inc., supra,* at p. 262.) It must be shown "'that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement.' (*Bose Corp. v. Consumers Union of U.S., Inc.* [(1984)] 466 U.S. 485, 511, fn. 30, 80 L. Ed. 2d 502, 104 S. Ct. 1949 . . . ; see also, *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 860, 231 Cal. Rptr. 518, 727 P.2d 711. . . .)" (*Khawar v. Globe Internat., Inc., supra,* at p. 275; *Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 688, 105 L. Ed. 2d 562, 109 S. Ct. 2678 ["there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity.'"].)

Because a defendant's protestations of a good faith belief in the truth of the published statements do not insulate the defendant from liability (*St. Amant v. Thompson, supra,* 390 U.S. at p. 732), objective evidence and circumstantial facts shedding light on the defendant's mental state are vital. "The actual-malice inquiry looks at circumstantial evidence of what the journalists knew rather than at circumstantial evidence of what turned out to be correct." (*Newton v. National Broadcasting Co., Inc.* (9th Cir. 1990) 930 F.2d 662, 683-684, fn. 42.)

Circumstances giving rise to serious doubt include, if a story is fabricated, if a story is based wholly upon unverified sources, if there are obvious reasons to doubt a source, or if the publisher's explanation of the errors is inherently improbable. (*St. Amant v. Thompson, supra,* 390 U.S. at p. 732; *Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 258.)

Neither negligence, extreme negligence, choice of language, editorial decisions, unknowingly misleading the public, investigative failures, nor lack of objectivity, by themselves, are sufficient to prove actual malice. Even extreme departures from journalistic standards are insufficient to meet the high burden. (*Harte-Hanks Communications v. Connaughton, supra,* 491 U.S. at p. 688; *McCoy v. Hearst Corp., supra,* 42 Cal.3d at p. 860; *Eastwood v. National Enquirer, Inc.* (9th Cir. 1997) 123 F.3d 1249, 1251, 1256.)

Actual malice must not be confused with the concept of common law malice. The two concepts are very different. Common law malice is usually expressed as an "evil intent or a motive arising from spite or ill will." (*Masson v. New Yorker Magazine, Inc., supra,* 501 U.S. at p. 510.) The

actual malice standard "'directs attention to the "defendant's attitude toward the truth or falsity of the material published . . . [not] the defendant's attitude toward the plaintiff."' [Citation.]" (*McCoy v. Hearst Corp., supra,* 42 Cal.3d at p. 872.)[12]

b. *Standard of review.*

Ross concedes that actual malice must be proven by clear and convincing evidence. This is a heavy burden, "far in excess of the preponderance sufficient for most civil litigation." (*Eastwood v. National Enquirer, Inc., supra,* 123 F.3d at p. 1252, fn. omitted.) It requires "convincing clarity." (*Bose Corp. v. Consumers Union of U.S., Inc., supra,* 466 U.S. at p. 511; *Newton v. National Broadcasting Co., Inc., supra,* 930 F.2d at p. 669.) The evidence must "'be such as to command the unhesitating assent of every reasonable mind. [Citation.]'" (*Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 274.)

With regard to actual malice, in ruling on a motion for a directed verdict, as when ruling on a motion for summary judgment, the heightened evidentiary burden applies. (*Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 252, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505.) Trial courts examine whether the plaintiff's evidence would "allow a rational finder of fact to find actual malice by clear and convincing evidence." (*Id.* at p. 254.)

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[12] To avoid confusing these terms, courts often refer to actual malice as constitutional malice. (E.g., *Nadel v. Regents of University of California* (1994) 28 Cal.App.4th 1251, 1258, fn. 1.)

On review from the granting of a directed verdict on the issue of actual malice, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. [Citation.]" (*Anderson v. Liberty Lobby, Inc., supra,* 477 U.S. at p. 255; *Edwards v. Hall* (1991) 234 Cal. App. 3d 886, 900-901, 285 Cal.Rptr. 810.)[13]

c. *Discussion.*[14]

Focusing on the News-Press's "attitude, or state of mind, toward the allegedly libelous material published[.] [Citations.]" (*McCoy v. Hearst Corp., supra,* 42 Cal.3d at p. 847), our task is to determine if a reasonable trier of fact could have found there was clear and convincing evidence

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[13] After a jury verdict, a reviewing court conducts an independent review as enunciated in *New York Times Co. v. Sullivan, supra,* 376 U.S. 254, *Bose Corp. v. Consumers Union of U.S., Inc., supra,* 466 U.S. 485, and *Harte-Hanks Communications v. Connaughton, supra,* 491 U.S. 657.

Ross seems to concede that this case involves a matter of public concern. Except when discussing what should occur if we were to order a retrial, the News-Press has not raised any issues with regard to Ross's obligation to prove malice as defined under state law. (Civ. Code, § 48a, subd. (4)(d).)

[14] The discussion in Ross's opening brief raising the actual malice issue is limited to the implication. Ross does not argue that the News-Press acted with actual malice in publishing the three challenged statements. Thus, the News-Press contends Ross has waived the right to address actual malice with regard to the three challenged statements. In his reply brief, Ross contends his actual malice argument also applies to the three challenged statements, and that in any event, the challenged statements and the implication are the same.

Ross's concession and our conclusion that the trial court did not err in granting the summary judgment make it unnecessary for us to address the News-Press's waiver argument.

that the News-Press acted with actual malice. We affirm the trial court's ruling if correct on any basis. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32, 913 P.2d 473.)

(1) *There was no clear and convincing evidence of actual malice.*

Ross first contends that actual malice was shown as a matter of law. This contention is not persuasive.

Ross argues as follows. The jury found that the News-Press intended to convey the false and defamatory implication. Sharp and McCumber admitted they knew the defamatory implication was not true.[15] Earlier drafts of the first article contained explicit statements that Ross was investigated for the same frauds as those that sent Marlin to jail, but these explicit statements were deleted by Sharp

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[15] Ross points to the following excerpts from the trial testimony:

During the examination of Sharp by Ross's attorney, the following occurred: "Q. Didn't you understand Mr. Nolan to tell you that he had conducted an investigation of Mr. Ross and Mr. Marlin for the frauds that sent Mr. Marlin to prison? [¶] A. Not exactly, No."

In the examination of McCumber by Ross's attorney, the following occurred: "Q. Can you explain to the jury why, if Miss Sharp and you believed that, based upon what Mr. Nolan had said in October or November, well after a month after the draft I am reading from, that Mr. Ross had been investigated for the frauds that sent Mr. Marlin to prison, the sentence I read was pulled [from] the final article? [¶] A. We didn't necessarily believe he was investigated for the specific acts that sent Marlin to prison. . . ."

A short time later, McCumber testified as follows: "Q. Wasn't your understanding based on what Miss Sharp told you based on her conversation with Mr. Nolan that he allegedly had said that he had investigated Mr. Ross for the Marlin frauds? [¶] A. It was my understanding – no, not precisely."

and are not found in the final article. Thus, the News-Press knew that the omitted statements were false, but intended to convey the same impression by implication.[16]

First, the jury's finding that the News-Press intended to convey the false implication was based upon a preponderance of the evidence standard, not the more elevated clear and convincing standard required to find actual malice. Additionally, even if Sharp intended to imply that Ross was investigated for the same frauds as Marlin, this would not demonstrate actual malice. It must be shown that Sharp knew the implication was false, or entertained serious doubts about its truth.[17]

Second, deleting information from the earlier drafts does not necessarily indicate actual malice as it has little probative value on the writer's subjective state of mind. Deleting words to be more "understated and cautious cannot possibly be grounds for actual malice." (*Newton v. National Broadcasting Co., Inc., supra,* 930 F.3d at p. 685; *Foodscience Corp. v. McGraw-Hill, Inc.* (D.Vt. 1984) 592 F. Supp. 362, 366.)

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[16] The News-Press points to statements in the September 17, 1988 and September 27, 1988 drafts.

[17] Citing *Newton v. National Broadcasting Co., Inc., supra,* 930 F.2d at page 681 and *Howard v. Antilla* (1st Cir. 2002) 294 F.3d 244 at page 252, the News-Press argues that with regard to implications, to show actual malice, publishers must have intended to convey the defamatory impression, and even if an implication is clear and inescapable to the fact finder, it cannot be said that the journalist intended to leave that impression where the testimony shows the journalists had no such intention.

Third, it is a mischaracterization of the record to conclude that the excerpts quoted in footnote number 15 showed that Sharp and McCumber *admitted* they *knew* the implication was false. These excerpts are neither clear nor unambiguous. When viewed in context, this testimony cannot be construed as admissions. Sharp and McCumber repeatedly testified that they believed Nolan had failed to indict Ross because there was insufficient evidence to do so. They believed Ross was investigated for fraudulent activities dealing with investors. Even if Sharp and McCumber did not know the exact parameters of that investigation, this showed a lack of knowledge rather than a subjective awareness of falsity.

Additionally, Sharp and McCumber had evidence from other witnesses and from documents suggesting Ross was part of the 1976 investigation. The import of the testimony was that neither Sharp nor McCumber *knew* the contents of the implication was false. (*Bose Corp. v. Consumers Union of U.S., Inc., supra,* 466 U.S. at p. 513 [reporter's word choice, even if reflecting a misconception insufficient to show actual malice]; *Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 951.)

Ross relies upon Nolan's testimony to support his position that Sharp and McCumber *knew* he had not been investigated for Marlin's frauds. Ross suggests Nolan's testimony proves Sharp lied because she wrote in the first article that "'Tom Nolan, the assistant U.S. attorney who prosecuted Marlin, said there was insufficient evidence to prosecute Ross.'" Ross suggests this was a lie because Nolan testified he never made this statement to Sharp,

and he testified that he only had two conversations with Sharp, not three as Sharp testified.[18]

This is the strongest evidence in favor of Ross's position. However, this evidence does not rise to the level of sufficient clarity to show that Sharp and McCumber acted with actual malice. At the most, it demonstrates that Sharp had conflicting information about whether Ross was part of the 1976 investigation and to what extent. Sharp's explanation of the events was not inherently improbable. It was supported by her written notes and reasonable explanations of the evidence.

Actual malice was not shown as a matter of law.

(2) *There was insufficient cumulative evidence to demonstrate actual malice.*

Ross contends the facts cumulatively demonstrate that the News-Press acted with actual malice. (Cf. *Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 257.) This contention is not persuasive.

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[18] In part of his testimony, Nolan denied making the statement attributed to him by Sharp in the first article as it pertained to the 1976 investigation. However, Nolan acknowledged that when he talked to Sharp, he might have used the term "insufficient evidence" when referring to the 1972-1974 investigation and when referring to a chart in his office that contained Ross's name. Further, Nolan testified in his deposition that he probably used that phrase because prosecutors do so when declining a case or when talking to newspaper reporters. Nolan also acknowledged that Sharp was confused about the two different investigations and that he spent considerable time explaining to her Marlin's defense, which included allegations about Ross.

Ross suggests the investigation was inadequate because Sharp did not access a number of documents, did not contact a number of available witnesses, did not ask Ross if he had been investigated for fraud, and did not do additional research after receiving the retraction requests. Ross also argues Sharp ignored contrary evidence. As examples of Sharp's purported failures, Ross notes that Sharp did not review the 1977 Marlin indictment, and did not contact Twitty, Almond, or Terry Bird (the United States Attorney who originally handled the Marlin investigation).

However, investigative failures do not necessarily prove actual malice. (*St. Amant v. Thompson, supra,* 390 U.S. at p. 733; *McCoy v. Hearst Corp., supra,* 42 Cal.3d at p. 860.) Sharp investigated for more than three months. She examined piles of documents, including the *Goodrich* complaint and the 1973 grand jury testimony in which Ross was questioned. She talked to numerous witnesses, including Nolan and Richard Noble (the attorney who represented the investors in the *Goodrich* case). The evidence did not show that Sharp believed her sources were unreliable or that Sharp entertained serious doubts about their reliability. (*Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at pp. 258-259 [investigative failures do not constitute actual malice; crucial issue is whether the defendant believed in reliability of sources].) Further, the News-Press was not obligated to contact Ross, ask him specific questions, or believe his denials in the face of conflicting evidence. (*Eastwood v. National Enquirer, Inc., supra,* 123 F.3d at p. 1254, fn. 10; *D.A.R.E. America v. Rolling Stone Magazine* (C.D. Cal. 2000) 101 F.Supp.2d 1270, 1284, fn. 3.)

The first retraction demand simply repeated Ross's general denials, which had been reported in the first article. The second retraction demand has no bearing on actual malice as it was sent after the two articles were published.

Ross further contends actual malice was shown because Sharp relied upon biased sources. For example, Ross notes that Sharp relied upon persons who had opposed Ross in civil litigation, including a lawyer for the investors who was Sharp's confidential source, Stephen Holohan. However, a reporter may rely upon biased sources as long as the reporter believes them to be credible. (*Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at pp. 258-259.) Sharp's sources had valuable information which she used as a springboard for further inquiry.[19]

Ross suggests Sharp deliberately altered Ross's words by stating that Ross said he "formally" severed his relationship with Marlin in 1971. This was not an unreasonable statement, given the information known to Sharp.

Relying upon the testimony of his expert, Sherrie Mazingo, Ross contends Sharp's deviations from journalistic standards constitutes actual malice. However, even extreme departures from journalistic standards, by themselves, do not show actual malice, as the focus is on the reporter's mental state with regard to truth and falsity.

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[19] Sharp sent Stephan Holohan a copy of the first article. Changes were made based upon Holohan's comments and the comments of Donald Murphy, a News-Press copy editor. Actual malice cannot be inferred from the fact that changes were made.

(*Harte-Hanks Communications v. Connaughton, supra,* 491 U.S. at p. 665.)

Ross also contends that Sharp was hostile toward him, approached the story with a preconceived slant, and that this animosity (which could be considered common law malice), demonstrated actual malice. Ross notes that even if common law malice is not the equivalent of actual malice, it can be evidence of actual malice. (*Harte-Hanks Communications v. Connaughton, supra,* 466 U.S. at p. 668; *Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 258.) Ross points to statements by Patrick O'Hara, Sharp's former editor, that Sharp called Ross a "sleaze ball" and a "slime bag." Ross also suggests Sharp sought out sources who would confirm her belief that Ross had been investigated for investor fraud, such as contacting state and federal bank regulators and insurance analysts. However, even if the evidence showed Sharp had a bias, it did not demonstrate that her journalistic approach gave way to conscious manipulation of the evidence. (Cf. *Reader's Digest Assn. v. Superior Court, supra,* at pp. 258-261.)

Ross further asserts that the articles provided a one-sided picture of the facts, demonstrating that the News-Press knew the implication was false. However, publishers need not provide "'an objective picture [citation] or an accurate one [citations].' [Citation.] So long as he has no serious doubts concerning its truth, he can present but one side of the story. [Citation.]" (*Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 259.) Similarly, Ross's accusation about Sharp's reporting techniques do not show actual malice, as it does not focus on Sharp's attitude about the truth or falsity of the articles. (*Fletcher v. San Jose Mercury News* (1989) 216 Cal. App. 3d 172,

185-186, 264 Cal. Rptr. 699 [aggressive, zealous reporting does not demonstrate reporter believed items to be untrue].)

Ross suggests that even if any of the above items, *by themselves,* do not show clear and convincing evidence of actual malice, cumulatively they point to a reporter who was "out to get" Ross, who conducted an investigation aimed at a pre-ordained result, who avoided the truth, and who drafted articles either knowing they were false, or with reckless disregard of the truth.[20] (*Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 257.) In raising this suggestion, Ross also brings forth the argument discussed above with regard to the purported lies made by Sharp in her testimony. We do not agree.

"'The standard of actual malice is a daunting one.' [Citation.]" (*Howard v. Antilla, supra,* 294 F.3d at p. 252.) Even if the record contained some evidence that could suggest actual malice, and even if all of the facts were construed in the light most favorable to Ross, the record

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[20] Ross also argues the trial court wrongfully excluded the following three items of evidence relevant to the actual malice issue: (1) facts suggesting Sharp lied in the first trial when she stated that she did not know she was entering Ross's property in Beverly Hills; (2) a Weitzman letter; and (3) references to loaded words. With regard to the first and third items of evidence, Ross has not shown the trial court abused its discretion in rendering its evidentiary rulings. (*Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal. App. 3d 503, 519, 241 Cal. Rptr. 916; *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639-640.) With regard to the Weitzman letter, any argument is waived as Ross does not cite to the record to demonstrate there was an evidentiary ruling. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; Cal. Rules of Court, rule 14(a)(1)(C).) In any event, this evidence does not change the outcome of this case.

lacked clear and convincing evidence that the News-Press subjectively entertained serious doubts about the truth of the articles or purposefully avoided the truth. There was little evidence that Sharp or McCumber had reason to doubt the veracity of the two articles and the implication drawn therefrom; there was little evidence that they consciously acted to avoid the truth; there were no extreme departures from journalistic standards; the News-Press's explanation was not inherently improbable; and this was not a slipshody investigation. Even if Ross proved Sharp was foolish or negligent, the evidence of actual malice was not such as to command the unhesitating assent of every reasonable mind.

In light of the record and the appropriate standards of constitutional law, the trial court did not err in directing a verdict for the News-Press on the issue of malice.

5. *The trial court did not err in ruling on an in limine motion regarding special damages.*

Ross contends Judge Kalin improperly revisited a ruling made by Judge Bolin with regard to special damages. This contention is unpersuasive.

a. *Additional facts.*

In October 1999, the News-Press brought a motion in limine re new special damage claims. The News-Press sought an order directing Ross not to refer to, nor submit evidence of, five items of special damages that Ross had

added to his complaint.[21] The motion was made on the ground that these special damage claims "involve alleged losses that are entirely speculative and/or contingent and therefore are unrecoverable as a matter of law."

A hearing was held. Judge Boland issued a tentative opinion. Thereafter, the parties submitted supplemental briefs regarding the court's authority to determine the validity of Ross's claim for special damages on a motion in limine.

On December 13, 1999, Judge Boland ruled as follows: Typically, in limine motions seek to "keep particular, specified items of evidence from the jury." However, in limine motions may attack all of a party's evidence on a particular issue. When used in such a manner, in limine motions are treated essentially as general demurrers or motions for judgment on the pleadings and only judicially noticeable facts and facts alleged in the pleadings may be considered. Here, the News-Press relied upon non-judicially noticeable extrinsic evidence. Further, the in limine motion could not be treated as a motion for nonsuit. (Code Civ. Proc., § 581c, subd. (a).) Essentially, the News-Press's in limine motion sought a summary adjudication of a claim for damages, but "a court is not statutorily authorized to summarily adjudicate claims for damages, other

[21] The October 1999 motion was directed at the following five items: Ross's inability to add to his stock holdings in hotel investors; Ross's inability to consummate transactions with the Robert M. Bass group; the rejection of Ross's investment opportunity in a Texas shopping center; Ross's inability to consummate transactions involving student housing properties in Texas; and other potential business opportunities not specifically identified in the amended complaint.

than exemplary damages, which do not dispose of a cause of action."

Judge Boland held: "Under Los Angeles Superior Court Rule 8.92(b), 'a motion in limine shall not be used for the purpose of seeking . . . summary adjudication of an issue or issues. Such motions may only be made in compliance with Code of Civil Procedure § 437c and court rules pertaining thereto.' Defendants seek summary adjudication of the validity of certain special damages claims. The fact that special damages claims could not be summarily adjudicated in compliance with § 437c does not mean that defendants can summarily adjudicate them on a motion *in limine*. Under Rule 8.92(b), if the alleged damage claims cannot be stricken as defectively plead, then the damage claims will survive at least until trial. At that point, defendants will be entitled to seek relief on the grounds that the claims are too speculative in the form of a motion for nonsuit, a motion for judgment under Code of Civil Procedure § 631.8, or a motion for judgment notwithstanding the verdict." (Fn. omitted.)

Thereafter, the parties each filed a number of in limine motions.[22] Some of the individual motions filed by the News-Press sought to prevent Ross from introducing the items that the News-Press had labeled speculative in the October 1999 motion. (See fn. No. 21.)

On March 8, 2000, the case was transferred to the long cause department and to Judge Kalin.

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[22] According to the News-Press, the parties filed a total of 45 in limine motions.

Prior to trial, Judge Kalin examined each motion in limine separately and rendered individual rulings. Some motions were granted, some were granted without prejudice, and some were denied.

In limine motion number 23 sought to exclude evidence relating to the Robert M. Bass group.[23] Judge Kalin granted in limine motion number 23, without prejudice. During trial, Judge Kalin sustained the evidentiary objection as speculative.

b. *Discussion.*

Ross contends Judge Boland's ruling precluded Judge Kalin from addressing the News-Press's motion in limine number 23. Ross argues Judge Kalin lacked the jurisdiction to consider this in limine motion.[24] This contention is not persuasive.

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[23] Ross claimed that he had approached the Robert M. Bass group with a proposal that would have resulted in a capital infusion in the Santa Barbara S & L, which in turn would have prevented the April 1990 federal takeover of the bank. Ross also claimed that he had another plan with the Bass group involving mortgage-backed securities that eventually would have resulted in approximately $250 million to him.

[24] Ross raised this issue in his opening brief on pages 56 to 66, without identifying which, if any, of the numerous motions in limine were improper. Ross's opening brief also omitted many vital citations to the record, including citations with regard to Judge Kalin's rulings. The only indication in Ross's opening brief as to which motion(s) Ross considered improper was found on page five, in the section labeled "procedural background." On page five, Ross cited to volume 22, pages 6398 to 6556 of his appendix, which was the News-Press's motion in limine number 23. In Ross's reply brief, he stated that his discussion

(Continued on following page)

By Judge Boland's December 13, 1999, ruling, he concluded that the motion as brought, which specifically requested an entire *classification* of evidence be excluded, was an improper attempt to summarily adjudicate an entire claim for damages. He noted that at trial the News-Press could use other vehicles to address whether *specific* damage claims were speculative. For example, Judge Boland opined that the News-Press could bring motions for nonsuit, for judgment under Code of Civil Procedure section 631.8, or for judgment notwithstanding the verdict. By this order, Judge Boland did not limit the type of vehicle by which the News-Press could address its argument with regard to individual items of evidence. Nor did Judge Boland address the admissibility of the specific items discussed in the motion.

The in limine motions considered by Judge Kalin immediately before trial, did not request re-evaluation of the issue addressed by Judge Boland, i.e., whether it was procedurally proper to use an in limine motion to eliminate an entire classification of evidence. The motions considered by Judge Kalin, including motion in limine number 23, requested specific evidentiary rulings. They did not seek to adjudicate an entire claim for damages.

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involved the News-Press's motions in limine numbers 8, 9, 20, 21, 22, 23, and 24.

We granted the News-Press's motion to strike that portion of Ross's reply brief that discussed the News-Press's motions in limine numbers 8, 9, 20, 21, 22, and 24, as they were not addressed in Ross's opening brief. We also granted the News-Press's motion to strike pages 66 to 71 of Ross's reply brief discussing Judge Kalin's instructions and admonitions to the jury as Ross's opening brief had not raised any issues or arguments relating thereto.

Thus, they were not attempts to circumvent Judge Boland's procedural ruling, nor were they improper motions for reconsideration. (Cf. *Payne v. City of Perris* (1993) 12 Cal.App.4th 1738, 1742; *Curtin v. Koskey* (1991) 231 Cal. App. 3d 873, 876, 282 Cal.Rptr. 706; *Ford v. Superior Court* (1986) 188 Cal. App. 3d 737, 233 Cal. Rptr. 607; Code Civ. Proc., § 1008 [motions for reconsideration].)

Judge Kalin's motion had the jurisdiction to rule on motion in limine number 23.

## DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

ALDRICH, J.

We concur:

CROSKEY, Acting P.J.,

KITCHING, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

LEONARD M. ROSS

Plaintiffs,

v.

SANTA BARBARA NEWS PRESS, THE NEW YORK TIMES COMPANY, a New York corporation dba SANTA BARBARA NEWS PRESS, a Division of THE NEW YORK TIMES COMPANY; KATHLEEN SHARP, an individual; DAVID McCUMBER, an individual; and DOES 1 THROUGH 10, inclusive.

Defendants.

Case No. C 744583

**JUDGMENT ON SPECIAL VERDICT**

(Filed Apr. 16, 2001)

This action came on regularly for trial on January 22, 2001 in Department 316 of the Los Angeles Superior Court, the Honorable Joseph Kalin presiding. The Plaintiff was represented by attorneys Anthony M. Glassman of Glassman, Browning & Saltsman, Inc., Adam S. Bram of the Law Offices of Adam S. Bram, Ernest Chen, of the Law Offices of Ernest Chen. Defendants were represented by attorneys Gary L. Bostwick and Kelli L. Sager of Davis Wright Tremaine, LLP.

A jury of 12 persons was regularly impaneled and sworn, witnesses were sworn and testified. The trial was bifurcated. After hearing the evidence and arguments of counsel on liability, the jury was duly instructed by the Court and the cause was submitted to the jury with

instructions to return a verdict on special issues regarding liability. The jury deliberated and thereafter returned into court with its verdict as follows:

Question No. 1

*Statement (A)* appears in the November 27, 1988 Article:

> "1972-76 Marlin and Ross are investigated by the FBI, as well as by a federal grand jury, a crime strike force, the U.S. Post Office, the Internal Revenue Service, and the Securities Exchange Commission."

1(a). Has plaintiff proven by a preponderance of the evidence that *Statement (A)* is false?

Answer ("yes" or "no") YES

1(b) Has plaintiff proven by a preponderance of the evidence that *Statement (A)* is defamatory?

Answer ("yes" or "no") YES

If your answer to EITHER one of these questions is "no," go to Question No. 2.

If your answer to BOTH of these questions is "yes," go to Question No. 1(c).

1(c) Have defendants proven by a preponderance of the evidence that *Statement (A)* was a fair and true report of one or more official government records or proceedings?

Answer ("yes" or "no") NO

If your answer is "yes." go to question No. 2.

If you answer is "no," go to Question No. 1(d).

1(d). Has plaintiff proven by a preponderance of the evidence that defendant Kathleen Sharp was negligent in writing *Statement (A)*?

Answer ("yes" or "no") YES

1(e) Has plaintiff proven by a preponderance of the evidence that defendant David McCumber was negligent in publishing *Statement (A)*?

Answer ("yes" or "no") YES

Question No. 2

*Statement (B)* appears in the February 28, 1989 Article:

> "As reported by the News-Press recently, Ross has been investigated by a number of law enforcement agencies for alleged fraud."

2(a) Has plaintiff proven by a preponderance of the evidence that *Statement (B)* is false?

Answer ("yes" or "no") YES

2(b). Has plaintiff proven by a preponderance of the evidence that *Statement (B)* is defamatory?

Answer ("yes" or "no") YES

If your answer to EITHER one of these questions "no," go to Question No. 3.

If your answer to BOTH of these questions is "yes," go to Question No. 2(c).

2(c). Have defendants proven by a preponderance of the evidence that *Statement (B)* was a

fair and true report of one of more official government records or proceedings?

Answer ("yes" or "no") NO

If your answer is "yes," go to Question No. 3.

If your answer is "no," go to Question No. 2(d).

2(d). Has plaintiff proven by a preponderance of the evidence that defendant Kathleen Sharp was negligent in writing *Statement (B)*?

Answer ("yes" or "no") YES

2(e). Has plaintiff proven by a preponderance of the evidence that defendant David McCumber was negligent in publishing *Statement (B)*?

Answer ("yes" or "no") YES

Question No. 3

*Statement (C)* appears in the February 28, 1989 Article:

> "The Federal Bureau of Investigation, the Organized Crime Strike Force, and a federal grand jury investigated both Marlin and Ross as a result of the allegations."

3(a). Has plaintiff proven by a preponderance of the evidence that *Statement (C)* is false?

Answer ("yes" or "no") YES

3(b). Has plaintiff proven by a preponderance of the evidence that *Statement (C)* is defamatory?

Answer ("yes" or "no") YES

If your answer to EITHER one of these questions "no," go to Question No. 4.

If your answer to BOTH of these questions is "yes," go to Question No. 3(c).

3(c). Have defendants proven by a preponderance of the evidence that *Statement (C)* was a fair and true report of one or more official government records or proceedings?

Answer ("yes" or "no") NO

If your answer is "yes," go to Question No. 4.

If your answer is "no," go to Question No. 3(d).

3(d). Has plaintiff proven by a preponderance of the evidence that defendant Kathleen Sharp was negligent in writing *Statement (C)*?

Answer ("yes" or "no") YES

3(e). Has plaintiff proven by a preponderance of the evidence that defendant David McCumber was negligent in publishing *Statement (C)*?

Answer ("yes" or "no") YES

Question No. 4

4(a). Has plaintiff proven by a preponderance of the evidence that the November 27, 1988 Article reasonably implies that Mr. Ross was investigated by the government for the same investor frauds that sent his former partner Barry Marlin to prison?

Answer ("yes" or "no") YES

If your answer is "no," go to Question No. 5.

If your answer is "yes," go to Question No. 4(b).

4(b). Has plaintiff proven by a preponderance of the evidence that defendants intended to convey the implication alleged by plaintiff in 4(a) above.

Answer ("yes" or "no") YES

If your answer is "no," go to Question No. 5.

If your answer is "yes," go to Question No. 4(c).

4(c). Has plaintiff proven by a preponderance of the evidence that the implication alleged by plaintiff in 4(a) above is false?

Answer ("yes" or "no") YES

4(d). Has plaintiff proven by a preponderance of the evidence that the implication alleged by plaintiff in 4(a) above is defamatory?

Answer ("yes" or "no") YES

If your answer to EITHER one of these questions is "no," go to Question No. 5.

If your answer to BOTH of these questions "yes," go to Question No. 4(e).

4(e). Have defendants proven by a preponderance of the evidence that the implication alleged by plaintiff in 4(a) above was a fair and true report of one more official government records or proceedings.

Answer ("yes" or "no") NO

If your answer is "no," go to Question No. 5.

If your answer is "yes," go to Question No. 4(f).

4(f). Has plaintiff proven by a preponderance of the evidence that defendant Kathleen Sharp was negligent in conveying the implication alleged by plaintiff in 4(a) above.

Answer ("yes" or "no") YES

4(g). Has plaintiff proven by a preponderance of the evidence that defendant David McCumber was negligent in conveying the implication alleged by plaintiff in 4(a) above?

Answer ("yes" or "no") YES

Question No. 5

5(a). Has plaintiff proven by a preponderance of the evidence that the February 28, 1989 Article reasonably implies that Mr. Ross was investigated by the government for the same investor frauds that sent His former partner Barry Marlin to prison?

Answer ("yes" or "no") YES

If your answer is "no," go to question No. 6

If your answer is "yes," go to Question No. 5(b).

5(b). Has plaintiff proven by a preponderance of the evidence that defendants intended to convey the implication alleged by plaintiff in 5(a) above?

Answer ("yes" or "no") YES

If your answer is "no," go to question No. 6.

If your answer is "yes," go to Question No. 5(c).

5(c). Has plaintiff proven by a preponderance of the evidence that the implication alleged by plaintiff in 5(a) above is false?

Answer ("yes" or "no") YES

5(d). Has plaintiff proven by a preponderance of the evidence that the implication alleged by plaintiff in 5(a) above is defamatory?

Answer ("yes" or "no") YES

If your answer to EITHER one of these questions "no," go to Question No. 6.

If your answer to BOTH of these questions is "yes," go to Question No.5(e).

5(e). Have defendants proven by a preponderance of the evidence that the implication alleged by plaintiff in 5(a) above was a fair and true report of one or more official government records or proceedings?

Answer ("yes" or "no") NO

If your answer is "no." go to question No. 6

If your answer is "yes." go to Question No. 5(f)

5(f). Has plaintiff proven by a preponderance of the evidence that defendant Kathleen Sharp was negligent in conveying the implication alleged by plaintiff in 5(a) above?

Answer ("yes" or "no") YES

5(g). Has plaintiff proven by a preponderance of the evidence that defendant David McCumber was negligent in conveying the implication alleged by plaintiff in 5(a) above?

Answer ("yes" or "no") YES

Question No. 6

6(a). Has plaintiff proven by a preponderance of the evidence that an economic relationship existed between himself and Santa Barbara Savings & Loan that contained a probable future economic benefit or advantage to plaintiff?

Answer ("yes" or "no") YES

If your answer is "no," go the last page and have the foreperson sign the form.

If your answer is "yes," go to Question No. 6(b).

6(b). Has plaintiff proven by a preponderance of the evidence that defendant Kathleen Sharp knew that an economic relationship existed between plaintiff and Santa Barbara Savings & Loan that contained a probable future economic benefit or advantage to plaintiff?

6(c). Has plaintiff proven by a preponderance of the evidence that defendant Kathleen Sharp, prior to publication of the November 27, 1988 article, made comments to employees of Santa Barbara Savings & Loan about plaintiff that were false?

Answer ("yes" or "no") NO

If your answer is "no," go to the last page and have the foreperson sign the form.

Dated: March 9, 2001 John Secunda

This is the verdict of the jury in the case of *Leonard Ross v. Santa Barbara News Press, The New York Times Company, Kathleen Sharp and David McCumber*, Case No. 744583.

Additional witnesses were sworn and testified. After hearing the evidence and arguments of counsel on damages, the jury was duly instructed by the Court and the cause was submitted to the jury with instructions to return a verdict on special issues regarding damages. The jury deliberated and thereafter returned into court with its verdict as follows:

"We, the jury, find:

QUESTION NO. 1

*Statement (A)* appears in the November 27, 1988 article:

> "1972-76 Marlin and Ross are investigated by the FBI, as well as by a federal grand jury, a crime strike force, the U.S. Post Office, the Internal Revenue Service, and the Securities Exchange Commission."

Has Plaintiff proven a preponderance of the evidence that *Statement (A)* caused damages to him?

Answer ("yes" or "no") NO

QUESTION NO. 2

*Statement (B)* appears in the February 28, 1989 article:

> "As reported by the News-Press recently, Ross has been investigated by a number of law enforcement agencies for alleged fraud."

Has plaintiff proven by a preponderance of the evidence that *Statement (B)* caused damages to him?

Answer ("yes" or "no") YES

QUESTION NO. 3

*Statement (C)* appears in the February 28, 1989 article:

> "The Federal Bureau of Investigation, the Organized Crime Strike Force, and the federal grand jury investigated both Marlin and Ross as a result of the allegations."

Has plaintiff proven by a preponderance of the evidence that *Statement (C)* caused damage to him?

Answer ("yes" or "no") YES

QUESTION NO. 4

The implication at issue in the November 27, 1988 article is that Mr. Ross was investigated by the government for the same investor frauds that sent his former partner Barry Marlin to prison.

Has plaintiff proven by a preponderance of the evidence that this implication caused damage to plaintiff?

Answer ("yes" or "no") YES

QUESTION NO. 5

The implication at issue in the February 28, 1989 article is that Mr. Ross was investigated by the government for the same investor frauds that sent his former partner Barry Marlin to Prison.

Has plaintiff proven by a preponderance of the evidence that this implication caused damage to him?

Answer ("yes" or "no") YES

QUESTION NO. 6

If you find that any of the statements or implications set forth above caused plaintiff to suffer injury to his good name and reputation, what do you find to be the amount of damages for that injury?

Answer $2.0 million

QUESTION NO. 7

If you find that any of the statements or implications set forth above caused plaintiff to suffer shame, mortification, injured feelings and mental suffering, what do you find to be the amount of damages for that injury?

Answer $250,000

Dated: March 29, 2001 John Secunda, Foreperson

This is the verdict in the case of Leonard Ross v. Santa Barbara News Press, The New York Times Company, Kathleen Sharp and David McCumber, Case No. 744583."

It appearing by reason of said verdicts that Plaintiff Leonard M. Ross is entitled to judgment, against Defendants Santa Barbara News Press, The New York Times Company, a New York Corporation dba Santa Barbara News Press, a Division of The New York Times Company, Kathleen Sharp, an individual and David McCumber, an individual.

**NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED** that Plaintiff Leonard M. Ross recover from Defendants Santa Barbara News Press, The New York Times Company, a New York Corporation dba Santa Barbara News Press, a Division of The New York Times Company, Kathleen Sharp, an individual and David McCumber, an individual, jointly and severally, the sum of $2,250,000.00 (Two Million Two Hundred Fifty Thousand Dollars) in compensatory damages with interest thereon at the rate of ten percent (10%) per annum from the date of the entry of this judgment until paid, together with costs and disbursements in an amount to be determined by the Court.

/s/ Joseph R. Kalin
JUDGE OF THE SUPERIOR COURT

DATED: Apr. 16, 2001

JOSEPH A. KALIN, JUDGE

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PROOF OF SERVICE BY PERSONAL DELIVERY

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 360 North Bedford Drive, Suite 204, Beverly Hills, California 90210-5157.

On April 4, 2001, I served the foregoing document(s) described as JUDGMENT ON SPECIAL VERDICT on the interested parties in this action addressed as follows:

Gary L. Bostwick, Esq.
Kelli Sager, Esq.
Davis Wright Tremaine
865 S. Figueroa St. Suite 2400
Los Angeles, California 90017

Said service was made by placing true copies thereof enclosed in a sealed envelope(s) address as stated above AND, delivering such envelope(s) by hand to the addressee(s) as stated above.

Executed on April 4, 2001 at Beverly Hills, California.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (FEDERAL) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

| | |
|---|---|
| /s/ Brenda Bilson | /s/ Brenda Bilson |
| Type or Print Name | Signature |

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| LEONARD M. ROSS,<br>Plaintiff, Respondent and Cross-Appellant,<br>v.<br>NEW YORK TIMES COMPANY, KATHLEEN SHARP, and DAVID McCUMBER,<br>Defendants, Appellants and Cross-Respondents. | B082419<br>(Super. Ct. No. C 744583) |

(Filed Mar. 24, 1997)

THE COURT:*

APPEAL from orders of the Superior Court of Los Angeles County, Harvey A. Schneider, Judge. Affirmed.

Leonard M. Ross, in propria persona; Glassman & Browning, Incorporated, Anthony Michael Glassman and Lori A. Nielsen, and Glassman, Browning & Saltsman for Plaintiff, Respondent and Cross-Appellant.

* KITCHING, Acting P.J. ALDRICH, J.

Gibson, Dunn & Crutcher and Rex S. Heinke; Davis Wright Tremaine, Kelli L. Sager, and Karen N. Frederisksen; and George Freeman, for Defendants, Appellants and Cross-Respondents.

This is a libel action by plaintiff Leonard M. Ross (Ross) against defendants, the Santa Barbara News-Press, a division of the New York Times Company, Kathleen Sharp, and David McCumber (collectively referred to as the News-Press), arising from publication of two newspaper articles about Ross. The articles discussed at length Ross's association with Barry S. Marlin, an individual who was incarcerated for investor fraud. The jury found in Ross's favor, against the News-Press, in the sum of $5 million for damage to reputation, plus $2.5 million for emotional harm. The judgment rested upon the jury's finding that Ross was defamed from the following false implication: "The tone and tenor of the [first article was] that Ross was investigated by the government for the investor frauds that sent his former partner Barry Marlin to prison."

The News Press moved for judgment notwithstanding the verdict or new trial. The court denied j.n.o.v. but ordered a new trial, on two grounds: the special verdict was internally inconsistent and the emotional distress award was excessive. Both sides appeal. We affirm.

## CONTENTIONS

The News Press contends it was entitled to judgment in its favor, on six grounds: (1) Ross's retraction demand was inadequate; (2) The implication was not actionable because it was true or substantially true; (3) Ross was a limited public figure; (4) Ross produced

insufficient evidence to prove his damages were caused by the libel; (5) Libel by implication requires the implication to have been produced by juxtaposing unrelated statements or produced by omitting facts; and (6) The proposition found libelous was not actionable because it was not provable as true or false.

Ross contends the trial court erred in ordering a new trial for the following reasons: (1) The jury's special verdict was not internally inconsistent; (2) The award for emotional harm was not excessive and the order did not sufficiently state reasons for this ruling; and (3) The trial court failed to offer him a remittitur.

## FACTUAL AND PROCEDURAL SUMMARY

### 1. FACTS

#### a. *The Articles.*

The action is based on two front-page articles about Ross appearing in the Santa Barbara News-Press, a daily newspaper published by The New York Times Company. Defendant Kathleen Sharp wrote the articles. Defendant David McCumber was executive editor.[1]

The first article appeared on Sunday, November 27, 1988, with the headline "S&L investor: Inquiries, suits mark career." It contained 102 paragraphs, plus a sidebar box consisting of a 15-item chronology. The article began with the statement, "Leonard M. Ross, a real estate investor whose complicated financial affairs have been

[1] As noted above, unless otherwise significant, we collectively refer to defendants as the News-Press.

investigated by several law-enforcement agencies, is seeking to increase his stake in Santa Barbara Savings and Loan Association's parent company to almost 25 percent of outstanding shares." The next few paragraphs stated Ross had collected $20 million in damages from insurance companies who had defended him in investor lawsuits and his partner, Barry S. Marlin, had been convicted of defrauding investors. The beginning of the article also stated the Ross had denied any wrongdoing and stated he had been unfairly tainted with Marlin's problems.

In the subsequent paragraphs, the article reported the following. Ross had obtained federal regulatory approval, and was awaiting state regulatory approval, for his proposal to buy shares sufficient to increase his shareholdings from 9.9 percent to 24.9 percent in Financial Corporation of Santa Barbara, the holding company of Santa Barbara Savings and Loan Association (Santa Barbara S & L). Santa Barbara S&L had been troubled in recent years and state regulators were taking a close look at Ross's share-purchase proposal.

Numerous paragraphs discussed Ross's resolution of investor lawsuits and the fact that Ross "pocketed more than $20 million" when he sued his former insurance companies. The balance of the article reported at length the results of the newspaper's study of court documents, transcripts of federal proceedings and comments of various individuals, including comments by Ross and his attorneys. These matters concerned Ross's business affairs during the period 1968 to 1973, and ensuring investigations and litigation, some of which was ongoing at the time of publication. These business affairs derived from Ross's association with Marlin. Ross and Marlin were partners in

an investment firm from early 1969 until late 1971, when Ross withdrew from the business. The article discussed Marlin's criminal activities, Ross's association with Marlin, the investor frauds committed by Marlin, and the fact Marlin was investigated by governmental agencies for these frauds and eventually incarcerated. Additionally, the article discussed accusations Marlin had leveled against Ross for pistol-whipping, extortion, and kidnapping, claiming Ross had forced him to turn over part of their business ventures. The article also discussed Ross's association with Attorney Lynn Boyd Stites.

The article contained additional information about Ross, such as he was valedictorian of his law school class at UCLA and lived in the Hearst-Davies mansion in Beverly Hills. It reported one of Ross's attorneys was Howard L. Weitzman, who had represented John DeLorean and Mike Tyson; Ross had successfully sued insurance companies for acting in bad faith; Ross had ended his association with Marlin before Marlin began defrauding investors; after investigating Ross's affairs, law enforcement authorities had not accused Ross of any crimes; and investors who sued Ross had never established any wrongdoing on his part.

The accompanying sidebar chronology began in 1968. The first item stated Ross graduated first in his law school class; the last item stated in 1988 Ross had settled his bankruptcy case and also applied for approval to purchase additional shares of the Santa Barbara S&L. Marlin is mentioned in eight of the fifteen boxes.

The second article, captioned "Rosses drop bid to buy S&L stock," appeared three months later, on Tuesday, February 28, 1989. It contained only 18 paragraphs. It

reported Ross had withdrawn his share-acquisition proposal. It reported the share price had dropped, dividend payments had stopped, and Santa Barbara S&L had lost money in 1988 and planned to make personnel and salary reductions. The article briefly summarized the first article, discussing that Ross had been investigated by a number of law enforcement agencies for alleged fraud; investors who participated in the Ross/Marlin syndicates claim they had been defrauded, and even though Marlin had been convicted, Ross was never charged with a crime or convicted of any wrongdoing.

b *Major Factual Controversy at Trial.*

At trial, the major factual controversy centered upon the investigation(s) of Ross and of Marlin.

The parties agreed that Ross was investigated in 1972-1974 for violations of the Hobbs Act (business taken through extortionate means), after Marlin accused Ross of extortion, kidnapping and pistol-whipping. This investigation was due to Marlin's 1971 accusation that shortly before Ross withdrew from the business, Ross, accompanied by his brother and two thugs, forcibly held Marlin prisoner in Ross's apartment overnight while they examined the books and records of the business. Marlin also told government investigators that Ross and others summoned Marlin to Ross's office, where they beat Marlin, struck him with a gun, and forced him to sign documents conveying his interest in the business to Ross. Ross was the target of this investigation, which was conducted by the FBI, a federal grand jury, and the Los Angeles Strike Force of the Organized Crime and Racketeering Section of the U.S. Department of Justice. The parties presented

contradictory testimony on whether or not the 1972-1974 investigation also was conducted by the United States Postal Service, the I.R.S. or the S.E.C. However, both parties agreed that no charges were filed against Ross.

The parties also agreed that in 1976 Marlin was investigated for investor frauds: in 1978 he was convicted and eventually imprisoned. The parties further agreed that persons had invested in limited partnerships and joint ventures promoted by Marlin and Ross, resulting in dozens of civil lawsuits filed against both Ross and Marlin.

A major controversy at trial turned on whether or not the criminal acts for which Marlin was indicted all occurred after Ross had terminated his relationship with Marlin and whether or not Ross had been involved, mentioned, connected to, or the subject of the 1976 investigation.

2. PROCEDURE

a. *Pretrial Proceedings.*

Ross sued the News-Press for defamation.

The News-Press filed a motion in limine, contending Ross's retraction request was inadequate as a matter of law. The trial court rejected this argument, as it did subsequently in ruling on the News-Press's motion for judgment not withstanding the verdict.

Upon Ross's motion for summary adjudication, the trial court held that for purposes of this litigation, Ross was a "private person" and not a "limited public figure."

The trial court denied News-Press's motion for summary judgment contending it was absolutely privileged to publish the two articles.

The trial court ruled on numerous motions, the effect of which excluded Ross from introducing evidence relating to special damages for lost business opportunities, precluded Ross from deposing certain witnesses and introducing evidence relating to his application before the California Department of Savings and Loan, and limited the evidence Ross could submit relating to damages to his reputation.[2]

b. *The Verdict Forms.*

The action was submitted to the jury for its determinations regarding four explicit statements (two from each article), plus two unstated implications (one from each article). As to each statement and implication, the jurors were asked by special interrogatories whether it was false or libelous; whether any defendant was negligent in writing or publishing it, and whether it was the legal cause of injury to Ross.

As to the two unstated implications, the jurors were also asked to find whether the alleged implication as the tone and tenor of the article in which it appeared.

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[2] Ross's claim for medical expenses was dismissed during trial.

The six items were as follow:

*FIRST ARTICLE*

(1) [Taken from the article's sidebar, captioned "A Ross Chronology"]: "1972-1976 Marlin and Ross are investigated by the FBI, as well as by a federal grand jury, a crime strike force, the U.S. Post Office, the Internal Revenue Service, and the Securities Exchange Commission."

(2) "The parking attendant was never found, said Arnold."

*SECOND ARTICLE*

(3) "As reported by the News-Press recently, Ross has been investigated by a number of law enforcement agencies for alleged fraud."

(4) "The Federal Bureau of Investigation, the Organized Crime Strike Force, and a federal grand jury investigated both Ross and Marlin as a result of the allegations."

*THE IMPLICATIONS*

(5) [The "tone and tenor (the implication)" of the first article was] "that Ross was investigated by the government for the investor frauds that sent his former partner Barry Marlin to prison."

(6) [The "tone and tenor (the implication)" of the second article was] "that Ross was investigated by the government for the investor frauds that sent his former partner Barry Marlin to prison."

c. *The Verdict.*

The basis of the libel judgment in Ross's favor was the fifth item *only*: the first article's implication "that Ross was investigated by the government for the investor frauds that sent his former partner Marlin to prison." The jury found this was the article's implication, the News-Press was negligent with respect to this implication and it was a legal cause of injury to Ross.

The jury also found the first three items to be false, libelous, and negligently prepared. However, the jury concluded these three items were *not the legal cause* of injury to Ross. The remaining items were not found actionable for other reasons.[3]

The jury awarded Ross $5 million for reputational damages and $2.5 million for emotional distress damages.

d. *Further Proceedings.*

On October 4, 1993, the court entered judgment on the verdict. Thereafter, the trial court denied the New-Press's motion for judgment notwithstanding the verdict, but ordered a new trial. It explained that its new trial order was based on two grounds. The first was that finding item 5 false (that the first article created a false implication "that Ross was investigated by the government for the investor frauds, that sent his former partner Barry Marlin

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[3] The jury found the fourth item was neither false, libelous, negligently stated nor a cause of Ross's injuries. It further found it was a fair and true report of an official government record. The jury also found the sixth item was not an implication of the second article.

to prison") was irreconcilable with finding item 4 *not* false ("The Federal Bureau of Investigation, the Organized Crime Strike Force, and a federal grand jury investigated both Ross and Marlin as a result of the allegations").

The second ground for granting the new trial motion was the excessiveness of the $2.5 million award for emotional distress.

The trial court also addressed, but did not rest its ruling upon, a third ground for granting the new trial motion: the inconsistency between the jury's finding item 5 false and a *cause* of damages, while at the same time finding item 1 ("A Ross Chronology"]: "1972-1976 Marlin and Ross are investigated by the FBI, as well as by a federal grand jury, a crime strike force, the U.S. Post Office, the Internal Revenue Service, and the Securities Exchange Commission") and item 3 ("As reported by the News-Press recently, Ross has been investigated by a number of law enforcement agencies for alleged fraud") were false, but *not* a legal cause of damages to Ross.

Ross's motion to vacate the new trial order was denied.

Both parties appealed. The News-Press appealed from the trial court's order denying judgment notwithstanding the verdict and from the order denying it summary judgment and granting Ross's motion for summary adjudication.

Ross appealed from the order granting a new trial, from the order denying his motion to vacate and from various pre-trial evidentiary rulings.

## DISCUSSION

### 1. CONTENTIONS BY THE NEWS-PRESS

#### a. *We Find Ross's Retraction Demand Was Adequate.*

The News-Press contends it is entitled to judgment because the retraction demand did not specifically identify the implication for which the jury awarded damages.[4] This contention is not persuasive.

##### (1) *Applicable Law.*

Plaintiffs seeking damages other than special damages must make a correction demand to the media publisher.[5] The written retraction request must specify the "statements claimed to be libelous and demand[] that the same be corrected. . . ." (Civ. Code, § 48a.)[6] The retraction requirement applies to explicit defamatory statements as well as to defamatory statements by implication. (*Kapellas* v. *Kofman* (1969) 1 Cal.3d 20, 33.)

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[4] There were two retraction demands, one made after each publication. The only one in issue here is the first retraction demand.

[5] The trial court ruled Ross could not demonstrate any special damages.

[6] Civil Code Section 48a reads in part: "In any action for damages for the publication of a libel in a newspaper . . . plaintiff shall recover no more than special damages unless a correction be demanded and be not published. . . . Plaintiff shall serve upon the publisher, at the place of publication . . . a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication . . . of the statements claimed to be libelous."

"The purpose of the requirement for the described specificity is to facilitate the publisher's investigative efforts in determining whether statements in the initial article contained error and should be corrected. By designating the remarks that the objector considers libelous, a notice may enable the publisher to narrow the scope of his investigation. . . . [¶] The crucial issue in evaluating the adequacy of the notice turns on whether the publisher should reasonably have comprehended which statements plaintiff protested and wished corrected." (*Kapellas* v. *Kofman, supra*, 1 Cal.3d at pp. 30-31; *Freedom Newspapers, Inc.* v. *Superior Court* (1992) 4 Cal.4th 652, 657-658; *MacLeod* v. *Tribune Publishing Co.* (1959) 52 Cal.2d 536, 553-554.)

Retraction demands "do not compose formal legal complaints [and they need not] conform to the niceties of common law pleading. [Civil Code section 48a was not intended] to build technical barricades to recovery by the individual who had given notice sufficient to advise a reasonable publisher acting in good faith of the claimed error." (*Kapellas* v. *Kofman, supra*, 1 Cal.3d at p. 31.) In determining the comprehensibility of the notice, the length of the article, along with other factors, such as the reasonable interpretation of the article, are evaluated. (*Id.* at pp. 32, 34.) Retraction demands are read "in conjunction with the questioned article. . . ." (*Id.* at p. 31.)

The adequacy of the correction demand is a legal issue for the court. Accordingly, we review the issue de novo. (*O'Hara* v. *Storer Communications, Inc.* (1991) 231 Cal.App.3d 1101, 1110; *Gomes* v. *Fried* (1982) 136 Cal.App.3d 924, 936.)

(2) *Discussion.*

Here, the first article contained 102 paragraphs and a chronology box consisting of 15 items, involved numerous topics, including Ross's interest in Santa Barbara S&L, accusations against Ross of pistol-whipping, kidnapping and extortion and a description of numerous civil lawsuits filed against Ross. Additionally, it discussed Ross's association with Marlin, the investigation by federal agencies of Marlin's activities and Marlin's eventual incarceration. In Ross's retraction demand, Ross detailed 22 statements (or multi-statement passages) which he asserted were false, misleading and libelous. The demand did not specifically request the News-Press retract the implication that the government had investigated Ross for "the investor frauds that sent his former partner Barry Marlin to prison."

However, the retraction demand specifically requested retraction of the article's first statement, i.e., "Leonard M. Ross, a real estate investor whose complicated financial affairs have been investigated by several law enforcement agencies,. . . . " It also objected to the "clear design of [the 22] statements [which] is to portray [Mr. Ross] in the worst possible light, including but not limited to, portrayal of Mr. Ross as . . . being knowingly involved in illegal activities. . . . "

The article repeatedly linked Marlin and Ross together, including their financial affairs. In context of the article, the request to retract the first statement put the paper on notice that Ross deemed defamatory the implication he was investigated for the investor frauds for which

Marlin was imprisoned.[7] Given the nature of the article and the retraction request, the paper was put on notice of that which Ross wished corrected. Unlike *Gomes* v. *Fried, supra*, 136 Cal.App.3d 924, the retraction notice here was sufficiently particular.

b. *It is Not Appropriate For Us to Conclude That The Implication Was Not True Nor Substantially True.*

The News-Press contends the implication was not actionable because it was true, or substantially true. This contention is not persuasive.

(1) *Applicable Law.*

(a) *Substantial Truth.*

"The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. [Citations.] It overlooks minor inaccuracies and concentrates upon substantial truth. As in other jurisdictions California law permits the defense of substantial truth and would absolve a defendant even if she cannot 'justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the

[7] Originally, the trial court found the first statement in the first article to be true because "[m]y reading of the statement in context, . . . is that it applies equally to both investigations. . . . " The trial court later clarified its ruling, finding the statement "not to be actionable. . . . " Thus, the parties were instructed to classify this statement as "unchallenged," i.e., that Ross had not contended it was false or defamatory.

details.' [Citation.] . . . Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the string, of the libelous charge be justified.' [Citation.] Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' [Citations.]" (*Masson* v. *New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 516-517.)

"In libel actions in which the questioned statement is susceptible to several interpretations, the initial function of the court is to determine whether the publication could reasonably have been understood to have a libelous meaning. It then becomes the jury's function to determine from the evidence which of the potential meanings was actually drawn by the readership." (*Kapellas* v. *Kofman, supra*, 1 Cal.3d p. 34, fn. 14.) In making this inquiry, the publication is not evaluated under the microscope of persons "'trained in the law, but by the natural and probable effect upon the mind of the average reader.' [Citation.]" (*Morningstar, Inc.* v. *Superior Court* (1994) 23 Cal.App.4th 676, 688.)

(b) *Burden of Review.*

Even though we are not dealing with the issue of malice, where the Supreme Court has mandated an independent review of the issue (*Bose Corp.* v. *Consumers Union of U.S., Inc.* (1984) 466 U.S. 485; *McCoy* v. *Hearst Corp.* (1986) 42 Cal.3d 835, 842), the News-Press contends we must review the issue of truth and substantial truth by the same standards, contending it is an ultimate constitutional question of law. (*Locricchio* v. *Evening News Ass'n* (Mich. 1991) 476 N.W.2d 112 [independently reviewed

falsity in case brought by private person on matter of public concern]; cf. *Franklin* v. *Leland Stanford Junior University* (1985) 172 Cal.App.3d 322, 330.) This standard of review requires us to "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof [of the issue.]" (*Bose Corp.* v. *Consumers Union of U.S., Inc., supra*, 466 U.S. at p. 511.) The parameters of an independent review in defamation cases are uncertain. (Elder, Defamation: A Lawyer's Guide (1993) § 4:1, pp. 1-6; Smolla, Law of Defamation (1996) § 12.09[4], p. 12-42-12-52; *Locricchio* v. *Evening News Ass'n, supra*, 476 N.W.2d at pp. 134-135 (dis. opn. of Cavanagh, J.).) However, in applying an independent review, we do not totally disregard the findings of the jury, which was in the best position to observe the demeanor of the witnesses. (*Harte-Hanks Communications* v. *Connaughton* (1989) 491 U.S. 657, 688; *Newton* v. *National Broadcasting Co., Inc.* (9th Cir. 1990) 930 F.2d 662, 670-672.) Further, at a minimum, an independent review requires us to apply the law to those facts which were necessarily found by the jury, in conjunction with the uncontroverted facts. (*Harte-Hanks Communications* v. *Connaughton, supra*, 491 U.S. at pp. 697-698 (conc. opn. of Scalia, J.).)

Here, we need not determine whether or not the issue of truth and substantial truth is a constitutional issue, demanding the elevated burden of scrutiny. For purposes of discussion, we shall treat the issue as a constitutional one requiring an independent review. (*Bose Corp.* v. *Consumers Union of U.S., Inc., supra*, 466 U.S. 485; *Harte-Hanks Communications* v. *Connaughton, supra*, 491 U.S. 657; compare with *Lundell Mfg.* v. *American Broadcasting*

*Companies* (8th Cir. 1996) 98 F.3d 351, 358-360 [when underlying facts as to gist and sting of defamatory charge are undisputed court may determine substantial truth as matter of law, otherwise sufficiency of evidence analysis applied in case brought by private plaintiff against media defendant].)

(2) *Discussion.*

As explained above, at a minimum, under the independent review utilized in evaluating some defamation issues, we apply the law to the facts which were necessarily found, in conjunction with the uncontroverted facts. The difficulty here is that the verdict verdict leaves no roadmap for us to follow. As we discuss in depth below, the verdict was inconsistent on major issues. It did not show clearly the jury's conclusion as to the truth or falsity of the claim Ross was investigated for the frauds for which Marlin was imprisoned. Further, if indeed the jury concluded the first article was false because it stated or implied Ross was investigated for the frauds for which Marlin was imprisoned, the verdict did not clearly indicate whether or not that falsity caused Ross damages. Thus, on the major factual issues, we cannot determine what the jury necessarily found. Having such ambiguous results, does not enable us to determine if the article, when taken as a whole, was true or substantially true.

In arguing the inference was substantially true, the News-Press states the following statements are true and uncontroverted: (1) Ross and Marlin were business partners and their business included third party investors; (2) Between 1972 and 1974 Ross was investigated by three law enforcement agencies, and this investigation, which

included allegations Ross committed extortion, pistol-whipping and kidnapping, involved his relationship with Marlin; (3) The 1972-1974 investigation of Ross arose from allegations of investor fraud; (4) Investigator Twitty recommended Ross be indicted; (5) Ross's name came up when Marlin was being investigated for the crimes for which Marlin was incarcerated; and (6) Ross and Marlin were accused of investor fraud in civil lawsuits. The News-Press then argues it was substantially true Ross was investigated by the government for the investor frauds which sent Marlin to prison.

However, all of these statements, and the inferences the News-Press wishes us to draw from these statements, were not uncontroverted. Additionally, by the jury's verdict, we cannot ascertain how the jury determined the factual issues involved. In order for us to evaluate the News-Press's argument, we would have to render factual conclusions which were for the jury to decide. (*Harte-Hanks Communications* v. *Connaughton, supra*, 491 U.S. at p. 688.) Further, we would have to evaluate the six statements in conjunction with the facts which were necessarily found, and we cannot determine from the inconsistent verdict exactly what was necessarily found. Thus, we are without sufficient factual findings upon which a determination of substantial truth can be made.

c. *Ross Was Not a Limited Public Figure.*

The News-Press contends Ross was a limited public figure. It then argues that since the jury found there was no malice, judgment must be rendered in its favor. This argument is not persuasive.

(1) *Relevant Facts.*

At the time the articles were published, Ross was the largest individual shareholder of Financial Corporation of Santa Barbara, the parent company of Santa Barbara S&L, the oldest and largest savings and loan in Santa Barbara. Together with his wife, Ross held approximately 9.9 percent of the stock. In April 1988, Ross attended a shareholder meeting for the Santa Barbara S&L where he spoke for approximately two to three minutes, suggesting a reduction in expenses. After the meeting, Ross declined to be interviewed by the News-Press.

In approximately August 1988, Ross applied to the banking regulatory agencies for permission to increase his ownership share in the Santa Barbara S&L to almost 25 percent. Prior to the publication of the first article, Ross had never given a press conference, had never held or run for public office, had never participated in any mass media (except for an appearance on the "Dating Game" 30 years ago), had never given any public speeches, and with the exception of one Coastal Commission hearing, had never appeared before any public agencies. He was active in a number of civic organizations a member in good standing with the California State Bar and also a licensed real estate broker.[8] Prior to the publication of the November

[8] Additionally, Ross was the chairman of the board, founder and sole shareholder of Rossco Holdings Incorporated, and majority shareholder of Lodge Co. Properties, Ltd., a closely held family partnership. These entities were involved in various real estate activities in Texas and California. Ross was also the general partner and majority interest owner in several closely held real estate and security investment partnerships. Further, he had engaged in the public debate over the purchase of land in the Santa Monica mountains.

27, 1988, article and after repeated requests, Ross consented to be interviewed.

Prior to publication of the articles in question, more than 50 articles had been published about the Santa Barbara S&L. Most of the articles were reports of its routine business affairs, such as personnel changes, summaries of its profits and losses, and its plans to sell branch offices. One article reported about the shareholder meeting in which Ross criticized management and that Ross had been unwilling to talk to reporters after the meeting. Other articles discussed general concerns about the banking industry.

(2) *Applicable Law.*

*New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254 held public officials may not recover for a defamatory falsehood unless there was proof the statement was made with "actual malice." (*Id.* at pp. 279-280; *Brown* v. *Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 721-722.) This requirement of proving malice was extended later to public officials and to private individuals not holding public office who are "nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." (*Curtis Publishing Co.* v. *Butts* (1967) 388 U.S. 130, 164 (Warren, C.J., conc. opn.) Persons who fall into this latter category are labeled "limited" or "vortex" public figures. (2

Smolla & Nimmer on Freedom of Speech (1996) § 23:4, p. 23-21.)[9]

Society's interest in protecting an individual's reputation prevents transmutation of all individuals into limited public figures simply because there exists, or the media has generated an interest in, and individual or a subject matter. (*Wolston* v. *Reader's Digest Assn., Inc.* (1979) 443 U.S. 157, 167-168; 4 Rotunda & Nowak (1992) § 20.35, p. 224.) "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." (*Hutchinson* v. *Proxmire* (1979) 443 U.S. 111, 135.)

An individual is a limited public figure when he "voluntarily injects himself or is drawn into a particular public controversy and therefore becomes a public figure for a limited range of issues." (*Gertz* v. *Robert Welch, Inc.* (1974) 418 U.S. 323, 351, limited by *Milkovich* v. *Loraine Journal Co.* (1990) 497 U.S. 1.)

An issue is not a "public controversy" merely because it is newsworthy "[I]t must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." (*Waldbaum* v. *Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1296.) Private disputes attracting public attention do not suffice as a "public controversy." (E.g., *Time, Inc.* v. *Firestone* (1976) 424 U.S. 448.)

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[9] Determining whether an individual is a limited public figure is a question of law for the court. (*Rosenblatt* v. *Baer* (1966) 383 U.S. 75, 88; *Stolz* v. *KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203.)

A limited public figure is one who "thrust himself into the vortex of this public issue [to] engage the public's attention in an attempt to influence its outcome." (*Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at p. 352). It is an individual who acts "in order to influence the resolution of the issues involved . . ." (*id.* at p. 345; accord, *Reader's Digest Assn.* v. *Superior Court* (1984) 37 Cal.3d 244, 252-255), and who has sought to influence public affairs, or by his or her position, can be expected to have a "major impact on the resolution of a specific public dispute . . . ." (*Waldbaum* v. *Fairchild Publications Inc., supra,* 627 F.2d at p. 1292.)

(3) *Discussion.*

Even if there was a nationwide discussion involving the savings and loan industry, the articles did not focus on this discussion or localize it to the Santa Barbara area. Rather, the articles discussed Ross's involvement with the bank and his desire to purchase an additional interest in the bank. Thus, as to this focus, any controversy was created by the newspaper articles. General concern over an item of interest to the community would not suffice to convert the general subject of the banking industry into a public controversy.[10]

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[10] *Time, Inc.* v. *Firestone, supra,* 424 U.S. 448 [prominent Palm Beach society woman in hotly contested divorce, "public controversy" not equated with public interest]; *Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. 323 [rejecting *Rosenbloom* v. *Metromedia, Inc.* (1971) 403 U.S. 29 which had required malice when falsehood related to matters of general or public interest].

Further, even if there was a public controversy and an interest in the banking industry, the nature and extent of Ross's involvement was limited. He did not create the controversy. (Compare with *Freedlander* v. *Edens Broadcasting, Inc.* (E.D. Va. 1990) 734 F.Supp. 221, 230.) Ross did not thrust himself into any dispute. Ross did not engage in conduct he knew would markedly elevate the chances he would become embroiled in a public controversy.[11] Ross did not have a history of setting standards in the banking industry. (Compare with *Waldbaum* v. *Fairchild Publications Inc., supra*, 627 F.2d 1287.) While Ross sought to increase his percentage ownership in Santa Barbara S&L, neither his shareholder status, his professional status, nor his status as a prominent business person invited public attention such that he relinquished his concerns about his name. Further, his application with governmental agencies did not convert Ross into a limited public figure, or otherwise everyone who made such a request would lose their private person status. (*Hutchinson* v. *Proxmire, supra*, 443 U.S. 111 [research behavioral scientist not limited public figure even though had applied for and received public funding, filed reports with a public agency and public concerned about public expenditures, as otherwise everyone who received or benefited from public grants for research would be a public figure].)

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[11] *Wolston* v. *Reader's Digest Assn. Inc., supra*, 443 U.S. 157 [plaintiff cited for contempt for failing to appear before grand jury not limited public figure when no attempt to engage public's attention to influence resolution of issues involved; association with a matter attracting public attention not sufficient to diminish his interest in protecting his name]; compare with *Silvester* v. *American Broadcasting Companies, Inc.* (11 Cir. 1988) 839 F.2d 1491, 1496-1497, disagreed with by *Ayala* v. *Washington* (D.C.App. 1996) 679 A.2d 1057, 1066, fn. 6.

Additionally, Ross did not act to attract the media or to influence a public debate. He did not maintain continuing or even sporadic contact with the media. Certainly, speaking for two or three minutes about expenditures did not make Ross a vocal advocate and merely responding to the News-Press's inquires did not justify making him into a public figure. (Cf. *Wolston* v. *Reader's Digest Assn., Inc., supra,* 443 U.S. 157; *Time, Inc.* v. *Firestone, supra,* 424 U.S. at p. 454-455, fn. 3.)[12]

d. *Ross Reduced Evidence His Damages Were Caused by the Libelous Inference.*

The News-Press contends it is entitled to judgment as a matter of law because the facts failed to show the alleged libelous inference caused Ross's injuries. The News-Press admits witnesses testified the article affected Ross's reputation and caused him emotional distress. However, the News-Press argues the testimony never connected these injuries to the alleged libelous implication. This contention is not persuasive.

Even if the implication was not cited verbatim by witnesses, they testified the false inference caused Ross's injuries. For example, Ross's wife, Merri Jean Ross,

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[12] The News-Press's citation to *Kaufman* v. *Fidelity Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 913 and *Hofmann Co.* v. *E. I. Du Pont De Nemours & Co.* (1988) 202 Cal.App.3d 390 is unavailing. Speaking at one shareholder meeting and responding to reporter's questions is not analogous to writing local residents to obtain public support for a zoning change in order to influence zoning officials. (Compare with *Hofman, supra.*) Trying to gain a larger share of a savings and loan is not similar to trying to influence public agencies to obtain approval for a building project. (Compare with *Kaufman, supra.*)

testified the articles strained their relationship and affected Ross's relationship with their children. She testified she knew of the charges Marlin had brought forth against Ross in 1972 and 1973. However, before the publication of the first article, she was unaware "that my husband was investigated with Marlin by government agencies for the investor fraud that Marlin went to jail for." Barry Devorzan testified he had discusses the articles with Ross and Ross "pointed out to me that the article was incorrect and unfair in that it suggested that he was involved with this Mr. Marlin. [¶]. . . . [¶] And that they had been partners, and that he had nothing to do with the fraud that sent Mr. Marlin to Prison. . . . [And that information made Ross] upset and angry." More than one witness testified Ross was upset at being linked to his former partner and Marlin's frauds. Additional testimony was that Ross was devastated at being tied to Marlin's frauds and was very concerned because his wife questioned him about the investor fraud portion of the article, connecting Ross to Marlin. Further, Ross's relationship with his wife suffered. One witness testified he was concerned about involving himself in future investments with Ross because the article implied Ross had been involved with governmental investigations. Another testified that when people in Santa Barbara discussed the article they were concerned about allegations of investigations and investor fraud, allegations harmful to Ross's reputation.

These and other statements demonstrate there was sufficient evidence that the alleged false inference

connected Ross to the governmental investigations of Marlin and that such inference harmed Ross's reputation and caused Ross emotional distress.[13]

e. *The Law Does Not Require a Libel by Implication to Have the Strict Requirements Suggested by The News-Press.*

The paper contends libel by implication cannot withstand scrutiny unless the unstated implication was either produced by juxtaposing unrelated statements, or by omitting facts that would dispel it. This contention is not persuasive.[14]

"The usual test applied to determine the meaning of an alleged defamatory utterance is whether it was reasonably understood by the recipient of the communication to have been intended in the defamatory sense." (F. Harper, et al., The Law of Torts, (1986) § 5.4, p. 48.) "The meaning of a communication is that which the recipient

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[13] The News-Press argues we are required to independently evaluate the causation issue because this case "[implicates] important First Amendment rights." However, the News-Press has failed to cite any authority holding this elevated standard of review is required in addressing an issue of causation, a traditional tort concept required in all but very few matters. (Cf. Civ. Code, §§ 44, 45a; 46; *Dun & Bradstreet* v. *Greenmoss Builders* (1985) 472 U.S. 749 [discussing if presumed and punitive damages can be awarded in defamation cases involving purely private concerns]; *Mitchell* v. *Gonzales* (1991) 54 Cal.3d 1041, 1052-1053 [substantial factor test]; BAJI No. 7.04.)

[14] The News-Press also argues libel by implication is only actionable if the implication was the primary implication to be drawn from the publication or intended by the publisher. However, even if this were the test when the plaintiff was a private individual, Ross presented evidence demonstrating both requirements.

correctly, or mistakenly but reasonably, understands that it was intended to express." (Rest.2d Torts (1977) § 563, p. 162.) "Under this standard, in order to prevail on a defamation claim, the language used must, as a matter of law, be reasonably capable of a defamatory interpretation and a jury must find that the language was actually understood by the recipient in that sense." (*White* v. *Fraternal Order of Police* (D.C. Cir. 1990) 909 F.2d 512, 519; accord, Rest.2d Torts, *supra*, § 614, p. 311.) "[W]e look to what is explicitly stated as well as what insinuation and implication can be reasonably drawn from the communication." (*Forsher* v. *Bugliosi* (1980) 26 Cal.3d 792, 803.)

In describing libel by implication, Prosser and Keeton on Torts (5th ed. 1988 pocket supp.) section 116, page 117 states, "if the defendant *juxtaposes a series of facts* so as to imply a defamatory connection between them, or creates a defamatory implication by *omitting facts*, he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct." (Italics added; fns. omitted.) Borrowing the italicized portion of Prosser's language, which has been repeated in some California authority (*Weller* v. *American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1003, fn. 10; *James* v. *San Jose Mercury News, Inc.* (1993) 17 Cal.App.4th 1, 12), the News-Press suggests libel by implication *must* be created by juxtaposing unrelated statements, or by producing the artifice of omitting facts that would dispel it.

However, Prosser's language is not to be taken as a limit on the concept of libel by implication. Rather, the discussion of juxtaposed or omitted wards is merely used by way of example, not as a mandate. Prosser understood that libel by implication arises because words always must

be examined in their context and examined as a whole. (*Selleck* v. *Globe International, Inc.* (1985) 166 Cal.App.3d 1123, 1131; Smolla, The Law of Defamation, *supra*, § 4.05[1], p. 4-18.2 & fn. 54; rest.2d Torts, *supra*, § 563, pp. 163-164 coms. c & d.) In determining if there is a libel by implication, "the expression used as well as the 'whole scope and apparent object of the writer' must be considered. . . ." (*Forsher* v. *Bugliosi, supra*, 26 Cal.3d at p. 803, citing *MacLeod* v. *Tribune, supra,* 52 Cal.2d at p. 546.) To determine if the words or presentation were manipulated to create a false implication, a specific method of manipulation is not required.[15] Therefore, contrary to the News-Press's suggestion, libel by implication does not contain the restrictions it proposes.[16]

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[15] Citing *Francis* v. *Dun & Bradstreet, Inc.* (1992) 3 Cal.App.4th 535, 540 [credit report is not actionable because report was accurate], *Lee* v. *Columbian, Inc.* (Wash.App. 1991) 826 P.2d 217 [defamatory meaning cannot be imputed to true statements], *Herbert* v. *Lando* (2nd Cir. 1986) 781 F.2d 298, 312 [overall impact of publication same as defamatory implication conveyed by individual statements, which are themselves not actionable] and *Partington* v. *Bugliosi* (9th Cir. 1995) 56 F.3d 1147, 1161, the News-Press contends the implication is not actionable. In the cases relied upon by the News-Press, the inferences were not actionable because they were identical or subsumed in that which was expressly stated. The News-Press then argues the inference here was not actionable because it was identical to the explicit statement contained in item 1, the chronology box. However, the inference (item 5) and item 1 both were found to be false, it is jut that item 1 was found not to have caused damages. The confusion pointed out by the News-Press (that the inference was found to be false and to have caused damages, whereas item 1 was found to be false but not to have caused damages), demonstrates why the jury was inconsistent. It does not demonstrate the implication was not actionable.

[16] The News-Press has not cited California cases which hold to the contrary; its citation to authority from other states is not controlling.

f. *The Implication Found Libelous Was Actionable.*

The News-Press contends the inference was not actionable because "it is evident that the enormous verdict by the jury was based on its belief that [the News-Press's] articles made [Ross] look like a 'crook' [and such conclusions are not provably true or false.]" This contention is not persuasive because it was not "evident" the jury's verdict was based upon the unactionable inference Ross was a "crook."

2. CONTENTIONS BY ROSS

a. *We Find the Jury's Special Verdict Was Internally Inconsistent.*

Ross contends the trial court erred in granting a new trial because the verdict was not internally inconsistent. This contention lacks merit.

(1) *Applicable Law.*

Code of Civil Procedure section 657 permits a trial court to grant a new trial when the verdict is "against law." (Code Civ. Proc., § 657, subd. 6.) While this ground for a new trial is in the same subdivision as that which permits the trial court to grant a new trial for "insufficiency of the evidence," the two are distinct, alternative grounds. (*Renfer* v. *Skaggs* (1950) 96 Cal.App.2d 380, 382-383.)

"When we say that the evidence is insufficient to justify the decision, we mean that there is an absence of evidence or that the evidence received is lacking in probative force to establish the proposition of fact to which it is addressed. [Citation.] 'An order granting a new trial on the

ground that the verdict [decision] is against law cannot be sustained by merely showing that it is unsupported by the evidence.' [Citation.]" (*Renfer* v. *Skaggs, supra*, 96 Cal.App.2d at p. 383.) "A decision can be said to be 'against law' within the meaning of Code of Civil Procedure section 657, subdivision 6, where the findings are irreconcilable." (*Campbell* v. *Zokelt* (1969) 272 Cal.App.2d 315, 318.) "Where the findings are so inconsistent, ambiguous, and uncertain that they are incapable of being reconciled and it is impossible to tell how a material issue is determined, the decision is 'against law.' [Citation.]" (*Renfer* v. *Skaggs, supra*, 96 Cal.App.2d at p. 383.)

"The inconsistent verdict rule is based upon the fundamental proposition that a factfinder may not make inconsistent determinations of fact based on the same evidence. The rule finds parallel expression in the law relating to court findings: 'Where the findings are contradictory on material issues, and the correct determination of such issues is necessary to sustain the judgment, the inconsistency is reversible error.' [Citation.]" (*Cavallaro* v. *Michelin Tire Corp.* (1979) 96 Cal.App.3d 95, 101.)

(2) *Discussion*

(a) *Inconsistency between Item 5 and Item 4.*

Here, the trial court found the verdict was inconsistent because the jury's finding that item 5 was false (that the first article created the false implication "that [Ross] was investigated by the government for the investor frauds that sent his former partner Barry Marlin to prison"), was irreconcilable with its finding that item 4 was not false ("The Federal Bureau of Investigation, the Organized Crime Strike Force, and a federal grand jury

investigated both Ross and Marlin as a result of the allegations").

As the trial court explained, the reference in item 4 to "the allegations" had to have pertained to the immediately preceding paragraph of the second article, which read: "As reported by the News-Press recently, Ross has been investigated by a number of law enforcement agencies for alleged fraud. Investors who participated in real estate syndicates formed by Ross and a partner, Barry S. Marlin, almost 20 years ago claim that they were defrauded of millions of dollars." The term "the allegations" had to have referred to allegations of fraud for which Marlin was eventually incarcerated.

It is impossible to reconcile these two findings, which were arguably identical. It is impossible to tell how the underlying material issues were determined. The trial court found that Item 5 and Item 4 state the same thing. Each refer to governmental investigations of Marlin and Ross and thus, the findings of the jury were inconsistent.

Ross contends the verdicts can be explained because item 4 was found in the second article, whereas the three specific items found to be false (items 1, 2 and 3) as well as the inference (item 5) were contained in, or inferred from, the first article. However, in making this argument, Ross neglects the obvious. Both articles stressed the connection between Marlin and Ross and neither article differentiated between the 1972-1974 investigation and the 1976 investigation. Further, the inconsistency is based upon content,

not when the statements were made. Thus, the distinction Ross makes is insignificant.[17]

(b) *Inconsistency between Item 5, and Items 1 and 3.*

Even if, as Ross contends, the verdicts are not internally inconsistent with regard to the findings on item 5 and item 4, another ground supports the new trial order: the jury's verdict was inconsistent when it found item 5 (the inference) caused damages, whereas it found items 1 and 3 were false, yet they did not *cause* Ross's damages.[18]

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[17] Ross notes the jury answered "No" to the question "Has [Ross] proved by a preponderance of the evidence that the tone and tenor (the implication) of the February 28, 1988 article is that Ross was investigated by the government for the investor frauds that sent his former partner Barry Marlin to prison?" He then argues this finding buttresses his argument that the jury looked differently at the two articles. Even if the jury might have concluded the second article, as a whole, did not leave the same false impression as the first article, it does not eliminate the fact that neither article differentiated between the two investigations.

We summarily reject Ross's argument the new trial order cannot be affirmed because the trial court misread the verdict. Although the trial court's order incorrectly stated item 4 was the chronology box, the context of the order as well as its subsequent oral statements clearly demonstrate the trial court made a clerical error. We also reject Ross's argument that any possible inconsistency was not prejudicial to the News-Press.

[18] Although the trial court did not explicitly consider this as a reason for granting the new trial, we may affirm on these grounds. (*Sanchez-Corea* v. *Bank of America* (1985) 38 Cal.3d 892, 905 ["[Code of Civil Procedure] section 657 requires an appellate court to affirm a new trial order if it should have been granted on any ground stated in the motion. However, an appellate court cannot affirm on grounds of insufficiency of the evidence or of inadequate or excessive damages unless such ground is stated in the new trial order."].)

Since the *content* of these items was arguably substantially similar, if damage flowed from one, damage had to have resulted from the others. Thus, these findings are internally inconsistent and cannot be reconciled.

Item 1 was taken from a sidebar item captioned "A Ross Chronology." It stated: "1972-1976 Marlin and Ross are investigated by the FBI, as well as by a federal grand jury, a crime strike force, the U.S. Post Office, the Internal Revenue Service, and the Securities Exchange Commission." Item 3 stated: "As reported by the News-Press recently, Ross has been investigated by a number of law enforcement agencies for alleged fraud."

Ross admits item 1 and item 3 "could not, by their nature, be related to the 1972 investigation of [him] for extortion. . . ."

If Ross was damaged because the News-Press falsely accused him of being investigated by governmental agencies for the fraud which sent Marlin to prison, Ross also had to have suffered damages by the false statement that specific agencies (the FBI, the federal grand jury, a crime strike force, the U.S. Post Office, the Internal Revenue Service, and the Securities Exchange Commission) investigated him. Item 1 is merely a more specific statement regarding the governmental investigation.

Additionally, if Ross was damaged because the News-Press falsely accused him of being investigated by governmental agencies for the fraud which sent Marlin to prison, then he had to have suffered damage by the false statement he was investigated by a number of law enforcement agencies for alleged fraud.

Ross contends these findings are not inconsistent because finding item 5 (the inference) caused him damages was proof that the "cumulative" effect of the articles caused him harm.[19] However, this argument presumes there was damage from the other items, as otherwise there is nothing to accumulate. If there was no damage from the other articles, there was nothing to accumulate.[20]

Thus, it is impossible to determine how a material issue was resolved and the verdict was internally inconsistent.

b. *We Are Not Mandated to Address the Evidentiary Issues Raised by Ross.*

Ross requests that we address numerous evidentiary rulings made by the trial court.[21] In that these issues may not arise upon retrial, are not issues of law (cf. Code Civ. Proc., § 43) and are not necessary to the disposition of the matter, we believe they are best left to the trial court. (Cf.

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[19] Ross also attempts to explain these verdicts by suggesting the jury merely wanted to prevent "unwarranted double recovery for the same injuries." By this argument, Ross is admitting the facts contained in item 1 and item 3 were substantially identical to the inference.

[20] In light of our conclusion the verdict was inconsistent, we need not address excessive damages, the other grounds for granting the new trial. Further, in light of this ruling, it would be inappropriate to conclude Ross was entitled to a remittitur and it would be inappropriate to affirm the reputation damage award.

[21] Ross questions the trial court's rulings which (1) excluded evidence of his special damages, (2) excluded evidence of what local residents and savings and loan customers said about him after the libel was published, and (3) precluded him from discovering and proving what state savings and loan regulatory officials thought of him, and what they said to him and his attorney, after publication of the libel.

*Young* v. *Three for One Oil Royalties* (1934) 1 Cal.2d 639, 646-647.)

## DISPOSITION

The order denying judgment not withstanding the verdict is affirmed. The order granting new trial is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KLEIN (Brett), J., concurring and dissenting:

I agree that the new trial order was correct. I write separately to express the view that defendants were also entitled to judgment notwithstanding the verdict, for two distinct reasons. First, the correction demand was insufficient. Second, plaintiff failed to prove that any damages were caused by the implication the jury found actionable.

1. *The Retraction Demand Was Insufficient, and Plaintiff Suffered No Special Damages.*

A retraction demand is "a written notice specifying the statements claimed to be libelous and demanding that the same be corrected." (Civ. Code, § 48a, subd. 1.)

The California cases teach that this statutory requirement is to be generously construed in favor of plaintiffs, but not to the point of obliteration. Thus in *MacLeod* v. *Tribune Publishing Co.* (1959) 52 Cal.2d 536, an unspecific retraction demand was deemed adequate where the newspaper article contained but a single reference to plaintiff. Similarly, in *Kapellas* v. *Kofman* (1969) 1 Cal.3d

20, 31, a demand for correction of "every statement concerning the conduct of [plaintiff's] children" was held sufficient to inform the publisher what corrections were demanded. By contrast, in *Gomes* v. *Fried* (1982) 136 Cal.App.3d 924, a newspaper published a captioned photograph implying plaintiff sleeps on the job, accompanied by an article making numerous other disparaging comments about his work performance. Plaintiff's correction demand specified certain disparaging comments, but did not mention the photograph or its caption. This was held an insufficient demand for retraction of the defamatory implication that he sleeps on duty.

The correction demand in the present case was even more inadequate than the demand in *Gomes* v. *Fried*. Here, the first article stated over 200 facts about plaintiff. Plaintiff's burden was simply to inform the publisher which facts should be corrected. Instead, his retraction demand letter, signed by counsel, complained at length that defendants should have written what they had been told by plaintiff, not what they had heard from other sources or seen in court documents. The plaintiff quoted 22 passages he said were false, misleading, or libelous, complained that these passages portrayed him in the worst possible light, and demanded that defendants "correct and retract the above-specified statements, collectively as well as individually."

This letter, though over 1500 words long, did not complain that the article stated or implied that the government had investigated plaintiff for the frauds for which Marlin went to prison. It did not request that defendants publish a correction clarifying that such was not the case. Indeed, only one of the 22 passages mentioned a government investigation: "Leonard M. Ross, a

real estate investor whose complicated financial affairs have been investigated by several law enforcement agencies,. . . . " (Ellipsis in original.)

A retraction demand must tell the publisher what statements are complained of, so that the publisher can decide whether to print a correction. The demand need not satisfy the "niceties of common law pleading." (*Kapellas* v. *Kofman, supra*, 1 Cal.3d at p. 31.) Plain English will suffice. All plaintiff had to write was, "Your article incorrectly implies that the government investigated me for the crimes that Marlin committed. Please print a correction saying that this was not so."

Instead, plaintiff's grapeshot retraction demand gave the publisher no inkling what plaintiff was requesting. Perhaps plaintiff had no idea either. The rambling retraction letter is attached as an appendix to this opinion, along with both newspaper articles. Essentially, the retraction letter said this: 'Your article makes me look bad. Here are 22 things in the article which I did not like. Please retract the entire article and write a more favorable one, in which you give less emphasis to my past, and more to the time and effort I have devoted in more recent years to cultivating an upstanding reputation through my devotion to charitable causes.'

A person claiming general damages from a defamatory newspaper article or radio broadcast must make a better retraction demand than this. If this retraction demand was adequate, then let newspaper publishers beware: the retraction statute no longer applies to long pieces of investigatory journalism.

Because his retraction demand was insufficient, plaintiff should be limited to recovery of provable special damages.

It could serve no purpose here to explain in detail the shortcomings of plaintiff's offer of proof of his special damages. His special damages evidence was mere gossamer.

In a defamation case, a plaintiff must adduce sufficient evidence that the defendant's wrongful conduct produced the harm for which he seeks recovery. As the rule was restated in *O'Hara* v. *Storer Communications, Inc.* (1991) 231 Cal.App.3d 1101, 1113, where there was evidence the defamation caused a disabling, professionally diagnosed psychiatric illness, "Two limitations apply to special damages: (1) they must be proved to a reasonable certainty; and (2) no special damages are recoverable if they are deemed remote." In this respect, plaintiff's claim – that but for the libel he would have rescued Santa Barbara Savings and Loan Association from its financial crisis – is reminiscent of the election libel cases, in which an unsuccessful candidate claims the libel cost him the election. Whether a plaintiff would have won an election absent the libel is regarded as too speculative to permit recovery. (*Fisher* v. *Larsen* (1982) 138 Cal.App.3d 627, 635-636.)

Because the insufficiency of the retraction demand barred general damages, and plaintiff had no proof of special damages, judgment should be entered in favor of the defendants.

2. *The Evidence Does Not Support the Finding That the Government-Investigation Implication Caused Plaintiff's General Damages.*

Plaintiff's proof of damage to his reputation and psyche was devoid of substantial evidence that this harm was caused by an implication that the government investigated him for the frauds for which Marlin went to prison, rather than by all the derogatory information contained in the first article. The article revealed a terribly damages truth about plaintiff's background: he got his start in business as partner of a man who perpetrated a Brobdingnagian swindle, and as a result investors had accused plaintiff of defrauding them of millions of dollars. In contrast, the implication the jurors found actionable pertained to one small aspect of plaintiff's relationship to Marlin and to the Willow Ridge pyramid.

In this regard, it should be noted that the trial court rejected defendants' offer to prove that plaintiff had a poor reputation before these articles appeared. The excluded evidence was that the great bulk of the facts reported in the articles was true; that plaintiff had a reputation for dishonesty in business, for outrageous litigiousness, and for a capacity to bribe government agents to avoid prosecution; that plaintiff did indeed engage in fraudulent business activities with Marlin; that FBI agents and a federal judge familiar with Marlin's prosecution were shocked that plaintiff was not prosecuted too; and that the SEC and the District Attorney of Los Angeles County investigated plaintiff for investor fraud – in sum, that plaintiff was known as a shark, if not a Marlin. Exclusion of this evidence tainted the jury's finding that plaintiff's reputation was damaged by the government-investigation implication. (See *Bertero* v. *National General Corp.* (1974)

13 Cal.3d 43, 65 fn. 11 [when sued for damage to reputation and emotional well-being, a defendant may adduce evidence that the plaintiff "did not have as good a reputation in the business community as his testimony tended to show"].)

Thus plaintiff failed to prove that any harm to his reputation and psyche was caused by the implication that the government investigated him for the frauds which landed Marlin in prison, rather than by the content of the articles in general.

For each of these two reasons, I would order entry of judgment in favor of defendants.

KLEIN (Brett), J.*

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* Judge of the Municipal Court for the Los Angeles Judicial District, assigned by the Chairperson of the Judicial Council.

1997 Cal. LEXIS 3358

**Leonard M. Ross, Appellant v. New York Times Company et al., Respondents**

**S061098**

**SUPREME COURT OF CALIFORNIA**

**June 11, 1997, Decided**

**JUDGES**: Mosk, J., and Chin, J., are of the opinion the petition should be granted.

**OPINION**:

Appellant's petition for review DENIED.

Mosk, J., and Chin, J., are of the opinion the petition should be granted.

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2003 Cal. LEXIS 9875

**LEONARD M. ROSS, Plaintiff, Appellant and Cross-respondent, v. SANTA BARBARA NEWS PRESS, ETC. ET AL., Defendants, Respondents and Cross-appellants.**

**S120033**

**SUPREME COURT OF CALIFORNIA**

**December 17, 2003, Filed**

**OPINION:**

The Time for granting or denying review in the above-entitled matter is hereby extended to and including January 30, 2004, or the date upon which review is either granted or denied.

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Court of Appeal, Second Appellate District, Division Three – No. B 151127

**S12003**

IN THE SUPREME COURT OF CALIFORNIA

En Banc

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LEONARD M. ROSS, Plaintiff, Appellant and Cross-respondent,

v.

SANTA BARBARA NEWS PRESS, ETC. et al., Defendants, Respondents and Cross-appellants.

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Petitions for review DENIED.

[FILED JAN. 14, 2004]

/s/ George
Chief Justice